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Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 310.

PEOPLE OF THE STATE OF NEW YORK, EX REL. ALBERT J. HATCH,
Plaintiff in Error,
against
EDWARD REARDON, a Peace Officer of the County of New York,
Defendant in Error.

Original.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN G. MILBURN,
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JOHN G. JOHNSON,
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INDEX.

PAGE

Statement 1

Specification of Errors 4

POINT I. To tax sales of shares of corporate stock exclusively is an arbitrary discrimination in violation of the provision of the Fourteenth Amendment securing the equal protection of the laws 4

POINT II. The Act imposes a tax on sales in New York of the shares of a foreign corporation owned by non-residents, and is a taxing of their property without due process of law, in violation of the Fourteenth Amendment, which invalidates the whole Act 15

POINT III. The Act, in adopting the face value of the shares as the basis of the tax, regardless of their real value, deprives the owners of stock of their property without due process of law, and denies to them the equal protection of the laws, in violation of the Fourteenth Amendment 18

POINT IV. This tax law is void under the commerce clause of the Constitution 21

POINT V. The judgment from which this writ of error was allowed should be reversed 62

Appendix :

Laws of New York, 1905, Chapter 241 63

Amending Act, Laws of New York, 1906, Chapter 414 66

Supreme Court of the United States.

PEOPLE OF THE STATE OF NEW YORK, EX REL.,
ALBERT J. HATCH,
Plaintiff in Error,

AGAINST

EDWARD REARDON, a Peace Officer of the County of New York,
Defendant in Error.

October Term, 1906.
No. 310.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF OF PLAINTIFF IN ERROR.

Statement.

The questions presented on this writ of error involve the validity, under the Constitution of the United States, of Chapter 241 of the Laws of 1905 of the State of New York, entitled "An Act to Amend the Tax Law by providing for a tax on transfers of stock."

This act provides for a tax "on all sales, or agreements to sell, or memoranda of sales or deliveries or transfers of shares or certificates of stock in any domestic or foreign association, company or corporation, made after the first day of June, nineteen hundred and five, whether made upon or shown by the books of the association, company or corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, or to secure the future payment of money or the future transfer of any stock, on each hundred

dollars of face value or fraction thereof, two cents." It is provided that the payment of the tax shall be denoted by an adhesive stamp or stamps affixed either upon the books of the company, or upon the certificate transferred, or upon the bill or memorandum of sale according to the nature of the transaction (section 315).

The act imposes both a criminal and a civil penalty for a violation of its provisions. It provides that any person making a sale without paying the required tax, or delivering any stock or evidence of the sale of any stock, or bill or memorandum thereof, without affixing the proper stamps, "shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned not more than six months, or by both such fine and imprisonment at the discretion of the court" (section 317). It further provides that "any person who shall violate the provisions of this article shall in addition to the penalties herein provided forfeit to the people of the state a civil penalty of five hundred dollars for each violation," to be collected in an action by the state comptroller (section 322).

By section 321 the state comptroller is authorized to inquire into and ascertain whether the tax required by the act has been paid, and for that purpose he "shall have the right and it shall be his duty to examine the books and papers of any person, firm, company, association or corporation." If from such examination he ascertains that the tax has not been paid, he shall bring suit for the recovery of such tax and for any penalty incurred.

It is further provided that no transfer of stock upon which the required tax is not paid at the time of such transfer "shall be made the basis of any action or legal proceeding, nor shall proof thereof be offered or received in evidence in any court in this state" (section 323).

The taxes imposed by the act and the revenues thereof are to be paid into the state treasury and be applicable to the general fund, and to the payment of all claims and demands which are a lawful charge thereon (section 324).

A copy of the act is inserted in an appendix to this brief.

On the seventh day of June, 1905, the relator, a citizen of the State of Connecticut, sold and delivered to one Charles W. Maury, likewise a citizen of Connecticut, in the City of New York, one hundred shares of the common stock of the

Southern Railway Company, of the par value of one hundred dollars a share, for the sum of thirty dollars and seventy-five cents per share in cash, and one hundred shares of the common stock of the Chicago, Milwaukee and St. Paul Railroad Company, of the par value of one hundred dollars a share, for the sum of one hundred and seventy-two dollars a share in cash. The sums for which the shares were so sold were their then market value. The Southern Railway Company is a corporation organized under the laws of the State of Virginia, owning and operating a system of railways situated wholly without the State of New York. The Chicago, Milwaukee and St. Paul Railroad Company is a corporation organized under the laws of the State of Wisconsin, owning and operating a system of railroads situated wholly without the State of New York. These sales were consummated by the delivery of two certificates of stock representing the shares sold, issued by the companies, respectively, assigned in blank, without the payment of the tax or the affixing of the stamps required by the act (Record, pp. 2, 6).

A complaint having been made by the said Maury, a warrant was issued, charging the relator with having committed a misdemeanor, and the defendant in error, a peace officer of the County of New York, by virtue of the warrant, arrested the relator and took him into custody (Record, pp. 2, 5, 6). Upon the relator's petition, a writ of *habeas corpus* was issued out of the Supreme Court of the State of New York. The defendant in error produced the relator before a Justice of that court, as directed by the writ, and made a return, to which the relator duly filed an answer (Record, pp. 9, 10, 12). The matter was thereupon heard by the Justice, who made a final order dismissing the writ and remanding the relator to the custody of the peace officer (Record, p. 13). This order was affirmed by the Appellate Division of the Supreme Court (Record, pp. 15, 16), and the order of affirmance was likewise affirmed by the Court of Appeals (Record, pp. 33, 34). The records and proceedings in the cause were subsequently remitted to the Supreme Court and the final order and judgment of the Court of Appeals was made and entered as the final order and judgment of the Supreme Court (Record, pp. 34, 35). Upon the petition of the relator, a writ of error has been duly issued out of this Court to review this final order and judgment (Record, p. 36).

The petition for the writ of *habeas corpus* duly raised the question of the constitutionality af the stock transfer tax act under the

Constitution of the United States (Record, p. 3), and this matter was argued before and passed upon by the State courts. The majority and dissenting opinions in the Appellate Division of the Supreme Court (Record, pp. 17–33) are reported in 110 App. Div., 821, and the opinion of the Court of Appeals (Record, pp. 42–59) is reported in 184 N. Y., 431.

It is the contention of the relator that the act is in contravention of the Constitution of the United States in the following particulars:

FIRST. It denies to the relator and to all owners of shares of corporate stock the equal protection of the laws, contrary to the Fourteenth Amendment.

SECOND. It deprives him and all other owners of stock of their property without due process of law.

THIRD. It imposes a tax upon commerce with foreign nations and among the several States, contrary to the provision of Section 8 of Article I.

POINTS.

I.

To tax sales of shares of corporate stock exclusively is an arbitrary discrimination in violation of the provision of the Fourteenth Amendment securing the equal protection of the laws.

The Act selects from the mass of property, real and personal, in the State one particular species, and one only, and imposes a tax upon every sale and transfer thereof. Sales of every other species of property are, and always have been, untaxed. The owners of every kind of property may freely sell it in the State of New York without paying any tax, save only the owners of shares of corporate stock. Such owners alone are selected to bear an exceptional and

peculiar burden, and sales of corporate shares are arbitrarily put in a class by themselves for the purposes of this tax.

(1) Classification of persons, property or transactions for purposes of taxation must be based on some real distinction to satisfy the constitutional guarantee of equality.

(a) The general rule of equality is that all persons subject to legislation "shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the limitations imposed."

Hayes vs. Missouri, 120 U. S., 68, 71.

Another statement of the rule is that equality is secured

> "if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

Duncan vs. Missouri, 152 U. S., 377, 382.

In Pembina Mining Co., vs. Pennsylvania, 125 U. S., 181, 188, it was said:

> "The inhibition of the amendment that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation."

In Connolly vs. Union Sewer Pipe Co., 184 U. S., 540, at pp. 560, 561, it was said:

> "The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations, in order to subserve public objects. For this Court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only

that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.' Gulf, Colorado and Santa Fé Railway v. Ellis, 165 U. S., 150, 155, 159, 160, 165."

In the case cited by the Court (Gulf, Colorado and Santa Fé R'y. Co. v. Ellis) it was said of the statute there involved, which provided for the recovery of attorneys' fees by successful litigants in actions against railway companies only:

"The statute arbitrarily singles out one class of debtors and punishes it for a failure to perform certain duties—duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection of the laboring classes, or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the state. Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency this statute cannot be sustained. But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this" (165 U. S., at p. 159).

(b) Classification for the purpose of taxation is subject to this rule of equality.

In County of Santa Clara vs. Southern Pacific R. Co., 18 Fed. Rep., 385, Mr. Justice FIELD, sitting in the Circuit Court, said:

"The first section of the fourteenth amendment places a limit upon all the powers of the State, including among others, that of taxation."

* * * * * * *

"Unequal taxation, so far as it can be prevented, is, therefore, with other unequal burdens, prohibited by the amendment. There undoubtedly are, and always will be, more or less inequalities in the operation of all general legislation arising from the different conditions of persons from their means, business, or position in life, against which no foresight can guard. But this is a very different thing, both in purpose and effect, from a carefully devised scheme to produce such inequality; or a scheme, if not so devised, necessarily producing that result. Absolute equality may

not be attainable, but gross and designed departures from it will necessarily bring the legislation authorizing it within the prohibition. The amendment is aimed against the perpetration of injustice, and the exercise of arbitrary power to that end. The position that unequal taxation is not within the scope of its prohibitory clause would give to it a singular meaning. It is a matter of history that unequal and discriminating taxation, leveled against special classes, has been the fruitful means of oppressions, and the cause of more commotions and disturbance in society, of insurrections and revolutions, than any other cause in the world. It would, indeed, as counsel in the San Mateo Case ironically observed, be a charming spectacle to present to the civilized world, if the amendment were to read, as contended it does in law: 'Nor shall any state deprive any person of his property without due process of law, *except it be in the form of taxation;* nor deny to any person within its jurisdiction the equal protection of the laws, *except it be by taxation.*' No such limitation can be thus ingrafted by implication upon the broad and comprehensive language used. The power of oppression by taxation without due process of law is not thus permitted; nor the power by taxation to deprive any person of the equal protection of the laws" (pp. 397, 399).

Accordingly, a provision of the California Constitution which discriminated in taxation against railroad and other *quasi* public corporations, was declared invalid as denying to them the equal protection of the laws.

In Central R. R. Co. vs. State Board of Assessors, 48 N. J. L. 1, a state tax upon the property of railroads and canal companies, and not upon other property, was declared unconstitutional, Chief Justice BEASLEY saying, at pages 19, 20:

> "Its effect simply is to segregate certain property from the mass of similar property; not to put upon it a proportionate part of a general tax, but to charge the part so segregated with the whole amount of a separate tax. * * * We think this is plainly arbitrary selection and not classification."

In Matter of Pell, 171 N. Y., 48, a tax was held invalid for the reason among others that it was confined to a limited class of remainder estates and therefore an arbitrary discrimination.

It is true that the constitutional requirement of equality is applied more sparingly and reluctantly to tax laws than to general legislation, but nevertheless it is applicable to them. (Connolly vs. Union Sewer Pipe Co., 184 U. S., pp. 562, 563). The purport of what was said in that case is that the legislative discretion in classifying

persons and property for taxation has a wider range and scope than is the case with legislation for other purposes—for instance, for the conduct of trade. Still a limit was placed to that discretion in the statement that it must "not invade rights secured by the Constitution of the United States," and the Court was careful to add: "We must not be understood by what has been said as conceding that the question of a denial of the equal protection of the laws can never arise under the taxing statutes of a State. On the contrary, the power to tax is so far limited that it cannot be used to impair or destroy rights that are given or secured by the supreme law of the land." In Bell's Gap R. R. Co. vs. Pennsylvania 134 U. S., 232, the wide discretion of the State with respect to the selection and classification of persons, property and occupations for taxation is recognized, but it is added: "All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject that would include all cases. They must be decided as they arise" (p. 237). They have been so decided, and in every case what was in the judgment of the Court a reasonable basis for the classification is pointed out.

In Kentucky Railroad Tax Cases, 115 U. S., 321, the valuation of railroad property by a different method than that applied to other property was sustained for the reason that the different nature and uses of the property justified the discrimination. In American Sugar Refining Co. vs. Louisiana, 179 U. S., 89, a discrimination in favor of one class of refiners was sustained because founded "upon a reasonable distinction in principle;" but it was said that it could not have been justified if "purely arbitrary, oppressive or capricious," or made to depend upon "*considerations having no possible connection with the duties of citizens as taxpayers.*" In Nicol vs. Ames, 173 U. S., 509, at pp. 521, 522, it was said that sales at exchanges "form a proper basis for a classification which excludes all sales made elsewhere from taxation," because of the difference in the means and facilities for making such sales, and that "the question always is, when a classification is made, whether there is

any reasonable ground for it, or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural."

The same is true of Pacific Express Co. vs. Seibert, 142 U. S., 339, 352, 353; Kidd vs. Alabama, 188 U. S., 730, 732; Armour Packing Co. vs. Lacy, 200 U. S., 226, 235; Cook vs. Marshall County, 196 U. S. 261, 274, 275; Savannah, Thunderbolt, &c., Ry. vs. Savannah, 198 U. S., 392, 397, 398; and Magoun vs. Illinois Trust and Savings Bank, 170 U. S., 283, 299, 300. In each of these cases there was found a basis for the classification deemed to be reasonable. In no case did the mere fact of classification carry its own justification. Hence the Act under consideration is invalid unless there is a real basis for the classification upon which it is founded.

(2) There is no basis for the separation of sales of shares of corporate stock from sales of all other species of personal property for the purposes of taxation.

(a) The Act taxes a particular transaction; the sale of shares of corporate stock. To put sales of shares of corporate stock in a class by themselves can only be justified if there be some essential difference between such a sale and a sale of other species of property *as a transaction*. What difference is there so far as the purposes and principles of taxation are concerned between a sale of a share of stock and a sale of any other kindred or allied species of property? None has so far been specified.

Shares of stock represent a proportional part of the property, real and personal, of the corporation issuing it (Jellenik v. Huron Copper Mining Company, 177 U. S., 1, 13; People v. Coleman, 126 N. Y., 433, 437; Matter of Enston, 113 N. Y., 174, 181; Flynn v. Brooklyn City R. R. Co., 158 N. Y., 493, 504). They are sold in the market and pass by transfer and delivery. The same is true of corporate bonds, of bills of lading representing property in transportation, of warehouse receipts representing property in storage, and of other kindred forms of property. Sales of any of these species of property are indistinguishable as transactions. A man who sells shares of stock is not in a different category from one who sells corporate bonds, bills of lading or warehouse receipts. He buys or sells them for the same reasons; he is, as the owner of them, in the same relations to the State and to the government as the owner of any other kind of property; he has no privileges that do not belong to them; the same rights, duties, obligations and burdens of ownership attach to all. What ground is there then for putting sales of cor-

porate shares in a class by themselves for purposes of taxation? What reasonable ground is there for putting in a separate class the owners of such shares for the purpose of subjecting them to a tax in the event of a sale of their property, from which the owners of every other kind of property, in the event of its sale, are free? There is, so far as we can see, absolutely none. There is certainly no difference between a sale or transfer of one hundred shares of stock worth ten thousand dollars representing an interest in the property of a corporation to that amount, and a sale or transfer of warehouse receipts or bills of lading representing property to that amount, or a sale and transfer of corporate bonds of that value, which justifies a classification for the purposes of taxation, including the first and excluding the others; and to tax sales of one of these species of property and not sales of the others is certainly not treating alike all persons "under like circumstances and conditions" (120 U. S., 68, 71).

Classification is based on similarities and differences. Similarities are the principle of inclusion and differences the principle of exclusion. To classify is to group together acts or things which have the same fundamental characteristics. That is the process whatever the purpose may be, whether taxation or any other. There are differences between real and personal property which constitute a sufficient basis for putting them in different classes. There are differences between corporate franchises and tangible property which justify their separate classification. There are differences between the occupations in which men engage which are a sufficient basis for a variety of classes. There are differences between transactions such as pledging, mortgaging and selling. But there is no real difference between a *sale* of the shares of a corporation and a *sale* of its bonds, or a *sale* of other like kinds of property, all of which are bought and sold in the market from day to day in the same way. No principle of classification justifies their being put into different classes for the purposes of taxation. It is a *reductio ad absurdum* to put corporate shares in one class and corporate bonds in another, and tax sales of one and not of the other on the theory that such a classification is founded on "a reasonable distinction in principle." To do so is, in the language of Judge COOLEY, "favoritism" which makes "no pretence to equality" and lacks "the semblance of legitimate tax legislation" (Cooley on Taxation, 3d ed., p. 382).

It is pertinent to ask whether an income tax levied upon

income solely derived from shares of capital stock would be a valid income tax, income derived from all other sources not being taxable. That question would seem to answer itself. Such taxation would be so obviously arbitrary, invidious and discriminating that not a word could be said in defense of it. But what difference in principle is there between selecting the owners of shares of stock for the invidious taxation of the income derived from their shares, and selecting every sale and transfer of their shares for the same purpose? From every point of view such taxation is a mere exercise of arbitrary power, imposing public burdens upon one set of citizens who are owners of shares of stock to the relief of all others who are owners of other kinds of property not differing in their essential characteristics, without the slightest vestige of a reason in law, policy or morals for such a discrimination.

(b) The Court of Appeals in its opinion does not point out any distinction or difference as a basis for the selection of sales of corporate stock for the purpose of exclusive taxation. It does say that it is a "large and comprehensive class as is shown by the revenue produced, which amounts to five or six millions per annum," which is between one-fifth and one-sixth of the entire amount raised by the state for state purposes. But size is no evidence of the differentiation essential to proper selection and classification. If the class properly constituted would be twice as big the burden of the tax would be reduced one-half. The Court assumes that the requirement of equality is observed because it "operates equally and uniformly upon all transfers of the class named when made by any person within the state." But that is true of every classification, legal or illegal. It would be true of a tax imposed exclusively upon all red haired men which would fall impartially on all members of the class. Still the color of the hair would perhaps not pass as a sufficient basis for a separate class. This test is inadequate for the reason that the equality clause requires, as the opinion itself shows, that the law "shall operate equally and uniformly upon all persons in similar circumstances" or in other words, all persons must "be treated alike under like circumstances and conditions" (Record, p. 50). That test the Court did not apply, and, we submit, it is fatal to the Act.

Various other taxes are mentioned as instances of legislative selection or classification for purposes of taxation, which have been

sustained. But one tax is in this regard rarely an analogy for another. Every tax is founded on a selection or classification governed by considerations peculiar to itself. It is enough to cite as instances among those mentioned, the tobacco tax, the oleomargarine tax, and the various forms of taxation connected with the sale of intoxicating liquors. The cases in which those taxes were involved show the special consideration of public policy upon which they were sustained. This is also true of all excise, or internal revenue, taxation and customs duties. The tax or duty on each article or commodity is fixed with reference to considerations peculiar to it, which is the established principle of all classification. Taxes on the right of succession to property by will and intestate laws are never confined to a single species of property. Moreover, they rest upon the consideration that the right is a privilege conferred by the State upon which it may impose such burdens and restrictions as it sees fit (27 Eng. and Am. Ency. of Law, 2d Ed., pp. 338, 339). On the other hand the sale of property is a right which inheres in the fact of ownership and is beyond the power of the State to destroy or impair under existing constitutional guarantees (Oxley vs. Lane, 35 N. Y., 340; Wynehamer vs. People, 13 N. Y., 378; Wright vs. Hart, 182 N. Y., 330). The fact is that all taxation involves selection and classification and every tax is an instance of it. Therefore to cite numerous taxes scarcely tends to show that a particular tax is founded upon a selection within the limits of legislative discretion however wide they may be.

(*c*) But it is said in the opinion of the Court of Appeals that the provisions of the War Revenue Act of 1898, which imposed a tax on sales and transfers of shares of stock, is "the prototype" of the act under consideration, and was sustained by this Court without dissent in United States vs. Thomas, 192 U. S., 363; and that case is treated as an authority explicitly in point on the ground that the State has as "much power to classify * * * as belongs to Congress" (Record, pp., 50, 52). This is giving an effect to both the Act and the case which they do not warrant.

The Act of 1898 imposed a tax not only on sales of shares of stock but upon every sale of any product or merchandise at any exchange or board of trade, or other similar place, and was part of an extensive system of stamp duties (Act of June 13th, 1898, Ch. 448, § 6, Schedule A, Sections 1 and 2). Considering the large number of exchanges all over the country for the sale of many

different kinds of commodities the Act covered a very wide range of sales. There is, therefore, no real analogy between the two Acts.

The objection of inequality and arbitrary discrimination was not and could not have been raised against the provisions of the Federal War Revenue Act in United States vs. Thomas, and was not discussed by this Court. That case decided only that the tax on sales of shares of stock imposed by the War Revenue Act was not a direct tax, but fell within the category of "duties, imposts and excises," as those terms are used in the Federal Constitution. This is clearly shown by the opinion of this Court (192 U. S., 363). Whether a tax is a direct tax or a duty, impost or excise, is a vital question with respect to Federal taxation because direct taxes are required to be apportioned among the several States according to their population, generally speaking, whilst the requirement as to duties, imposts and excises is that they shall be uniform throughout the United States, by which is meant geographical uniformity (U. S. Constitution, Article 1, Sec. 2, sub. 3; Sec. 8, sub. 1; Sec. 9, sub. 4; Thomas vs. U. S., 192 U. S., 363; Knowlton vs. Moore, 178 U. S., 41). No such question arises as to state taxation, and therefore the Thomas case is not a relevant authority.

Moreover, the equality clause of the fourteenth amendment is confined to state legislation. The limitations on the taxing powers of Congress are those respecting the apportionment of direct taxes, the uniformity of duties, and the non-taxability of exports. As was said in License Tax Cases, 5 Wall., 462, at page 471:

> "It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution with, only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion."

(d) The statement in Otis vs. Parker, 187 U. S., 606, 610, that this Court could not say "that treating stocks of corporations as a class subject to special restrictions was unjust discrimination or denial of the full protection of the laws," which is quoted in the opinion of the Court of Appeals (Record, p. 49), is not to be given an application wider than was intended. There was under consideration in that case the provision of the constitution of California

providing that all contracts for the sales of shares of corporate stock on margin should be void. This provision was designed to reach a particular evil, and the power to legislate with regard to it was sustained under the so-called police power of the State. It was that circumstance which was held to furnish " a reasonable ground for the classification " (p. 610). But that was a classification for a particular purpose, and it does not follow that the same classification would hold good for all purposes. Clearly it would not do so in the absence of special circumstances as a reasonable ground or basis.

The act is a clear instance of a class of persons " being singled out as a special subject for discriminating and hostile legislation." The tax produces over six millions of dollars a year, or about one-fifth of the total amount of the State's taxation for ordinary State purposes. This is a burden imposed upon a special class arbitrarily constituted. No one would dream of raising such an amount from sales of any of the commodities of trade because of the unpopularity of such a measure. But owners of corporate stock are popularly assumed to belong to the wealthy class, and the prejudice against that class is depended upon to relieve the discriminating and hostile character of the tax from opprobrium. Moreover, New York City is the great market of stocks for the whole country, and as the tax is payable by the vendor, it was shrewdly conceived that it would be an efficacious means of taxing non-residents and making them pay a material part of the cost of the government of the State. These are the reasons why sales of corporate stocks were put in a class by themselves for the purposes of an exclusive tax, and they demonstrate not only the unrelieved arbitrariness of the act, but the spirit of hostility to a particular class in which it was conceived.

II.

The Act imposes a tax on sales in New York of the shares of a foreign corporation owned by non-residents, and is a taking of their property without due process of law, in violation of the Fourteenth Amendment, which invalidates the whole Act.

(1) A tax on a sale of property is virtually a tax on the property itself. In Cook vs. Pennsylvania, 97 U. S., 566, 573 it was held that a tax on the amount of sales of goods made by an auctioneer was a tax on the goods so sold. It was said in Nicol vs. Ames, 173 U. S., 509, 521, that "a tax upon the privilege of selling property at the exchange and of thus using the facilities there afforded in accomplishing the sale differs radically from a tax upon every sale made in any place. *The latter tax is really and practically upon property.* It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded." In Brown vs. Maryland, 12 Wheat., 419, at page 444, Chief Justice MARSHALL said that "*all must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself.*" It is by an application of the same principle that a tax on income from property is held to be a tax on the property producing it, and a tax on a bill of lading to be a tax on the property represented by it (Pollock vs. Farmers' Loan and Trust Company, 157 U. S., 429, pp. 581, 582; Almy vs. California, 24 How. U. S., 169; Fairbank vs. U. S., 181 U. S., 283).

In Fairbank vs. U. S., *supra*, it was held that a stamp tax on a foreign bill of lading is equivalent to a tax on the articles included in the bill, and, therefore, a tax or duty on exports in violation of the Constitution, and the ruling in Nicol vs. Ames, *supra*, that a tax on sales is really a tax on the property sold was cited and applied with approval (181 U. S., 293). The opinion in the case contains an elaborate review of the authorities on this subject (pp. 293–297).

A sale of property is an exercise of one of the rights of ownership, and no distinction can be drawn between a tax on the exercise of a right of ownership and a tax on the property itself. Property is in its final analysis simply a complex mass of rights over a tangible

or intangible thing, the main one of which is the right of alienation. To deprive a man of that right would largely destroy the value of any article of property (Wynehamer vs. People, 13 N. Y., 378, at pp. 396, 398; Wright vs. Hart, 182 N. Y., 330). To tax its exercise is, therefore, to tax a main element in the value of the property, and consequently the property itself.

A tax on sales of shares of a corporation is on this theory either (*a*) a tax on the property of the corporation represented by the shares, or (*b*) on the shares themselves, treated and regarded as "a distinct species of property."

(*a*) Shares of the capital stock of a corporation represent its property, good will and franchises (People vs. Coleman, 126 N. Y., 433, 437; Matter of Bronson, 150 N. Y., 1, 8; Flynn vs. Brooklyn City R. R. Co., 158 N. Y., 493, 504). "Certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the Company for the benefit of the true owner" (Jellenik vs. Huron Copper Mining Co., 177 U. S., 13). They "are simply the muniments and evidence of the holders' title to a given share in the property and franchises of the corporation of which he is a member" (Mechanics Bank vs. N. Y. & N. H. R. R. Co., 13 N. Y., 599, at p. 627). It follows that a sale of shares of stock is a sale of an interest in the property and franchises of the corporation, and if a tax on a sale is a tax on the thing sold then a tax on a sale of shares of a foreign corporation owning only property outside of the State is a tax on an interest in that property outside of the State. But a State's power of taxation is limited to persons and property within its jurisdiction, and to tax property outside of the State is to take property without due process of law. (State Tax on Foreign Held Bonds, 15 Wallace, 300; Delaware Railroad Tax, 18 Wallace, 206; Louisville Ferry Co. vs. Kentucky, 188 U. S., 385; D. L. & W. R. R. Co. vs. Pennsylvania, 198 U. S., 341; Union Transit Co. vs. Kentucky, 199 U. S., 194; People vs. Equitable Trust Company, 96 N. Y., 387, 393). The record shows that the offense with which the Relator—who is a citizen and resident of the State of Connecticut—is charged was the sale of shares of two foreign corporations owning railroad systems entirely outside of the State of New York (Record, pp. 2, 6). Their property was not taxable in that State, and the Act under consideration in attempting to impose what is "really and practically" a tax upon an interest in that property is void.

(*b*) But regarding shares as a distinct species of property, and a

tax on sales of shares, not as a tax on the property which they represent, but as a tax on the shares themselves, the same result follows with respect to shares of a foreign corporation owned by a non-resident. Assuming, for the purposes of the argument, that the shares of a foreign corporation might be taxed by the State of New York if owned by a citizen of the State, or if, though owned by a non-resident, they had acquired a *situs* in the State, no such condition or situation is presented here. The act imposes a tax on every sale within the State of corporate shares of a foreign corporation owned by non-residents, though there merely to be sold. Hence, a non-resident who sends or brings shares of a foreign corporation into the State merely to sell them, is required to pay the tax. But shares of a foreign corporation owned by a non-resident brought or sent into the State for the purpose of sale are not subject to the taxing power of the State, and taxation of them by the State deprives the owner of his property without due process of law in violation of the Fourteenth Amendment (Board of Assessors vs. Comptoir National, 191 U. S., 388, 402, 403, 404; N. Y. C. R. R. Co. vs. Miller, 202 U. S., 584, 597; see Matter of Enston, 113 N. Y., 174, 181; Matter of James, 144 N. Y., pp. 6, 12; Hoyt vs. Commissioners of Taxes, 23 N. Y., 224).

In the Matter of Enston *(supra)* it was said with reference to the shares of a foreign corporation that the *situs*

> "can in no proper sense be said to be where the certificate happens to be in the hands of an agent in a State where the corporation has no existence and the owner no domicile."

We do not think it can or will be contended that shares of stock of a foreign corporation representing property out of the State and owned by a non-resident when temporarily within the State for sale are taxable by the State, and there is nothing to the contrary in the opinion of the Court of Appeals.

The shares sold by the relator, a non-resident, were shares of a foreign corporation and they were bought by a non-resident (Record, p. 6). The Court of Appeals says: "The State found them here, and the presumption, in the absence of evidence to the contrary, is that they were subject to taxation here. If, owing to special circumstances, they were not, it was incumbent upon the relator to prove the fact" (Record, p. 54). But a criminal statute is not, we submit, to be so construed or applied. *Prima facie*, shares of a foreign corporation owned by a non-resident are not taxable in the State of New York. They are only taxable there if they are there

under such circumstances that they have acquired a *situs* in the State. If sales of such shares may be taxed if they have a *situs* in the State, but not if they are merely there for sale and have no such *situs*, it would surely be necessary to establish a criminal violation of an act taxing such sales to show that the sale was a sale of shares having a *situs* in the State. The criminal charge made in this case did not allege that the shares sold had a *situs* in the State. Therefore, the relator may insist that the shares he sold had not a *situs* within the State; that the act imposed a tax on the sales; and that in imposing such a tax it is unconstitutional and invalid.

As the Act is for this reason invalid with respect to shares in foreign corporations owned by non-residents and sold here, and as that part or operation of the act is an essential part of it and not separable from the remainder, and it is not clear that the legislature would have enacted it without including sales of shares in foreign corporations owned by non-residents, the necessary result is that the whole act must be held invalid (Pollock vs. Farmers' Loan & Trust Co., 158 U. S., 601, 635; Connolly vs. Union Sewer Pipe Co., 184 U. S., 540, 565).

III.

The Act, in adopting the face value of the shares as the basis of the tax, regardless of their real value, deprives the owners of stock of their property without due process of law, and denies to them the equal protection of the laws, in violation of the Fourteenth Amendment.

On this point we beg to call the attention of the Court to the dissenting opinion of Justice INGRAHAM in the Appellate Division (Record, pages 25–33).

The Act fixes the tax at two cents on "each hundred dollars of face value or fraction thereof" (Section 315). This is a purely artificial and arbitrary basis. It is a matter of common knowledge that the market value of stocks of the same par value varies

between wide limits. The record in this case shows that the shares of Chicago, Milwaukee & St. Paul Railroad Company were worth one hundred and seventy-two dollars a share and those of the Southern Railway Company thirty dollars and seventy-five cents per share, though both were of the same face value (Record, page 2). There are wider differences than this in railroad shares that are bought and sold every day. Shares of industrial companies range from over par to less than ten per cent. of their face value. Shares of banks and trust companies vary from par to very high figures, ten times their par value and more. But the tax imposed by this Act is the same amount whatever the market value of the share—whether ten dollars or one hundred or five hundred dollars. This is a gross and absolutely unnecessary inequality. There is no reason, practical or theoretical, why the tax should not be paid on the basis of the actual consideration for any sale. The War Revenue Act of 1898 adopted that basis as to various transactions, such as conveyances of real property and sales at exchanges, and it was and is just as workable as an artificial basis.

Stocks differ from corporate bonds as to the ordinary relation between their par and their real value. It may be as was said in Bell's Gap R. R. Co. vs. Pennsylvania, 134 U. S. 232, 236, that the par value of bonds may be presumed to be their real value. A corporate bond is an obligation for the payment of a fixed sum of money at a fixed time and at a fixed rate of interest, usually secured by the property of the corporation. Its market value, therefore, rarely varies widely from its face value. Stocks are radically different, as any list of their current market values shows.

The true nature of the tax is not to be disregarded. It is not a stamp tax on an instrument in common use in commercial transactions, like a check, or bill of exchange or receipt (Fairbank vs. U. S., 181 U. S., 277, 289, 290). It is a tax on sales of corporate shares, and therefore as we have shown (Point II.) on the shares themselves. It is not a fixed sum for each sale whatever the amount. It is a fixed sum for each hundred dollars, measured not by real value or real consideration, but by face value, which is merely an inscription on an instrument and perhaps the true value at the time of issue only. The rule in New York State is to tax property, transfers by will and intestate succession, and franchises according to real values measured by natural standards. The exception is this Act with its artificial and grossly unequal and discriminating standard.

This feature of the Act is emphasized by the claim which was made on behalf of the State that the tax was payable on *each share* of a hundred dollars, or fraction thereof, and that, therefore, the same tax should be paid on the sale of a share of a mining company of the par value of five dollars and a real value of less as on the sale of a share of a railroad company of the par value of one hundred dollars and a real value of two or three hundred. To remove any doubt as to the validity of this position, and what was considered by the state officials as the ambiguity giving rise to the doubt, the amending Act of 1906 was passed imposing the tax on "*each share* of one hundred dollars of face value or fraction thereof" (Laws of New York, 1906, Chap. 414, printed in the appendix to this brief). Thus this more than flagrant inequality is now the clear mandate of the statute.

It is said that the War Revenue Act of 1898 fixed the tax on the same basis as this Act. But even if there were no difference between the powers of Congress and the powers of the State in this regard this objection was never raised, so far as we know, during the short life of that Act, or adjudicated.

It was said in Pollock vs. Farmers Loan & Trust Co., 157 U. S., 429, at p. 599:

"The inherent and fundamental nature and character of a tax is that of a contribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a tax."

This Act, in the artificial and arbitrary standard it fixes for measuring the amount of the tax, is a clear violation of the principle thus formulated by this Court resulting in discrimination and inequality in the burden it imposes upon members of the same class.

IV.

This tax law is void under the commerce clause of the United States Constitution because it taxes any and every sale within the State of New York of stock in a foreign corporation, though such stock belongs to a person not a resident of the State of New York, and such sale is made by such non-resident, and though no certificates of the shares of such stock ever existed or were ever delivered to the purchaser.

If not void in toto this tax law is void as applied to Hatch, the non-resident owner and seller of shares in a foreign corporation; and Hatch was entitled to be discharged on the writ, and the Court erred in remanding him to the custody of the respondent.

The foreign corporation stock sold is not property within the State of New York, but its *situs* is either where the corporation exists and has its property or is at the domicile of the stockholder (*Matter of Enston*, 113 N. Y., 174, 181, and other cases cited, *ante*, Point II.).

Shares and their Situs—the New York Doctrine.

What are shares of stock, what their *situs*, and what are the rights of the owner therein? These questions have been frequently decided by the highest courts in the State of New York. Thus in *Plimpton vs. Bigelow*, 93 N. Y., 592, 596, 600, the Court said:

"We do not doubt that shares for the purpose of attachment proceedings may be deemed to be *in the possession of the corporation which issued them, but only at the place* where the corporation by intendment of law always remains, to wit, in the State or country of its creation" (p. 600).

Again, in the same case, Judge ANDREWS, for the Court, said:

"The right which a shareholder in a corporation has by reason of his ownership of shares, is a right to participate according to the amount of his stock in the surplus profits of the corporation on a division, and ultimately on its dissolution, in the assets remaining after payment of its debts" (p. 599).

So in the case of *Jermain vs. Lake Shore & M. S. R. Co.* (91 N. Y., 483, 492), referring to the nature of shares of stock and rights of ownership therein, Judge EARL said :

"A share of stock represents the interest which the shareholder has in the capital and net earnings of the corporation. The interest is of an abstract nature, that is, the shareholder cannot by any act of his, nor ordinarily by any act of the law, reduce it to possession."

This is shown by the language of the certificates of shares, which are in the general form set out in the footnote.[1]

So in the *Matter of Bronson* (150 N. Y., pp. 1, 21), VANN, J., said :

"Shares of stock should be distinguished from certificates of stock, which are merely evidence as to the number of shares to which the holder of the certificate is entitled (Jermain vs. Lake Shore & M. S. R. Co., 91 N. Y., 483, 492). The same rights exist whether any certificate is issued as evidence of those rights or not. Formerly no certificates were issued, and the only evidence of the existence of the right was upon the books of the corporation (23 Am. and Eng. Ency. of Law, 484; Cook on Stock and Stockholders, sec. 1)."

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[1] SUBSTANCE OF CERTIFICATE.

This certifies that John Smith is *entitled to One hundred shares* of the Capital Stock of the Northern Pacific Railroad Company *transferable on the books of said Company in person or by attorney.*

Dated ....., ...

....
President.

....., ...
Secretary.

[ASSIGNMENT.]

For value received, I, John Smith, do hereby sell, assign and transfer to William Jones One hundred shares of the *capital stock* of the Northern Pacific Railroad Company *represented* by the within certificate and hereby constitute and appoint .... my true and lawful attorney to make the transfer of the said shares on the books of said company.

Dated ....., ...

(Signed) JOHN SMITH.

The learned Judge said that this view accords with the doctrine of the *Enston case* (113 N. Y., 174, 181), where it was said:

"The situs of the property owned by a shareholder in a corporation is either where the corporation exists, or at the domicile of the shareholder."

The same doctrine was declared in the *James case* (*re* James, 144 N. Y., 6, 12).

These cases are not overruled by *Simpson vs. Jersey City Contracting Co.*, 165 N. Y., 193, which does not profess to overrule them, and turned on its special facts.

And such is also the doctrine of this Court, as to the nature of shares and their situs.

State Tax on Foreign Held bonds, 15 Wall., 300;
Delaware Railroad Tax, 18 Wall., 206;

Jellenik vs. Huron Copper Mining Co., 177 U. S., 1, is a well considered case which approves the New York doctrine as to nature and *situs* of shares of stock.

Thus, Mr. Justice HARLAN in the *Jellenik* case (p. 12), delivering the opinion of this Court, said:

"The Court of Appeals of New York, speaking by Judge COMSTOCK, held certificates of stock to be simply muniments and evidence of the holder's title to a certain number of shares in the property and franchises of the corporation of which he is a member. *Mechanics' Bank vs. New York & New Haven R. R. Co.*, 13 N. Y., 599."

The entire paragraph of Judge COMSTOCK's opinion from which the above extract is taken, is as follows (page 626):

"Looking at the question upon principle, I am not aware of anything in the nature or uses of this kind of property which requires an application of the rules which belong to negotiable securities. Stocks are not like bank bills, the immediate representative of money, and intended for circulation. The distinction between a bank bill and a share of bank stock it is not difficult to appreciate. Nor are they like notes and bills of exchange, less adapted to circulation, but invented to supply the exigencies of commerce, and governed by the peculiar code of the commercial law. They are not like exchequer bills and government securities, which are made

negotiable either for circulation or to find a market. Nor are they like corporation bonds which are issued in negotiable form for sale, and as a means for raising money for corporate uses. The distinction between all these and corporate stocks is marked and striking. They are all in some form the representative of money, and may be satisfied by payment in money at a time specified. Certificates of stock are not securities for money in any sense, much less are they negotiable securities. They are simply the muniments and evidence of the holder's title to a given share in the property and franchises of the corporation of which he is a member."

After this discussion in the above case of *Jellenik vs. Huron Copper Mining Company*, this Court, through Mr. Justice HARLAN, says, concerning the nature of shares and their situs, as follows (page 13) :

" The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the Company for the benefit of the true owner. As the habitation or domicile of the Company is and must be in the State that created it, the property represented by its certificates of stock may be deemed to be held by the Company within the State whose creature it is, whenever it is sought by suit to determine who is its real owner. This principle is not affected by the fact that the defendant is authorized by the laws of Michigan to have an office in another State, at which a book showing the transfers of stock may be kept."

In *Union Refrigerator Transit Co. vs. Kentucky*, 199 U. S., 194, this court held that the State of Kentucky could not tax even a corporation organized under the laws of the State of Kentucky, on property permanently located in other States, and that a statute attempting to do so violated the due process of law clause of the Fourteenth Amendment.

It thus appears that the concurrent doctrine of the New York Courts and of this Court is that a share of stock is the stockholder's interest in the corporation ; in this case it is Hatch's interest in the *Virginia* and *Wisconsin* corporations ; and that interest had no *situs* in the State of New York.

In this tax Act as applied to this case, the State of New York undertakes to say to Hatch, a citizen and resident of the State of Connecticut : " You shall not come into the State of New York and sell within the State of New York stock in a corporation of Wisconsin, owning and operating a system of railroad situated wholly outside the State of New York, unless you pay to the State

of New York a tax on every sale of such stock for the privilege of making such sale."

The Court of Appeals in the present case states (page 54):

"It does not appear how long the certificates in question had been in the state, or that they were here for some temporary purpose when they were sold by the relator to the complainant. For aught that appears, they had been here for years in the possession of the owner, or deposited for safe keeping, and had a situs here, so that they were subject to taxation here."

On the contrary, it appears by the petition in the present case (Rec., p. 1) that Hatch "*resides in Stamford, Connecticut, and is a citizen of the State of Connecticut.*" The criminal complaint states the same thing (Rec., p. 6). The presumption, therefore, is (and especially so in this criminal case) that the certificates for the shares sold by Hatch accompanied his person—that is, were with him at the place where he resided; namely, Stamford, Connecticut. Especially is this so, as there is no statement in the record showing any fact as to whether or not Hatch had his business in New York, or came to that city for the purpose of doing business daily, weekly, or only occasionally. As we have already shown, the presence or absence of the certificates is immaterial, because the tax is levied on the sale, irrespective even of the existence of certificates. But if the presence or absence of the certificates here is to be deemed material, then the presumption and the only presumption that can be indulged in, in this case, is that Hatch brought them here with him from Connecticut, his place of residence, as there is no showing to the contrary. Furthermore, if there was any showing that Hatch came here every day to do business his rights would not be any the less under the interstate commerce clause of the constitution. That clause does not read that it protects only a man who goes occasionally from one state into another for the purpose of transacting interstate commerce, but a man who goes every week or every day from one state to another to engage in interstate commerce is protected equally with the man who goes once a year or less frequently. The drummers in the *Drummer cases infra* could have come into the state once a day or as often as they pleased.

THE PRECISE QUESTION *presented in this case* under the commerce clause of the Constitution of the United States is, whether the State

of New York can say to citizens and residents of other States, you shall not sell within the boundaries of the State of New York property situated in other States than New York unless you pay a tax to the State of New York on every such sale. The question is whether such a statute is an interference with interstate commerce. A similar question would arise if the State of New York should say to the citizens of other States: "You shall not sell in New York or come into the State of New York to sell lands or other property situated in other States unless you pay to the State of New York a tax on any and all such sales."

The thing which is the subject of the sale in the present case, to wit, the stock in foreign corporations owned by a non-resident, is situated outside of the State of New York, and cannot be brought within this State. The State of New York is powerless to tax such stock *as property*, because it is not within New York's boundaries or jurisdiction (*Matter of Enston*, 113 N. Y.. 174, 181; other cases, see *ante*, Point II.). It is settled law in this country that a State cannot tax *non-resident* shareholders in a *foreign* corporation for the plain reason that it has no jurisdiction (see cases, *ante*, Point II.). The question here presented is whether a tax by the State of New York on the *sale* of stock in a foreign corporation when made by a non-resident is an interference with interstate commerce. That such a tax *tends* to prevent residents of other States from selling such stock in New York is beyond question. It is immaterial whether the tax be great or small. If the tax were half the value of the stock the effect would be prohibitory. The principle is the same, though the tax be smaller. The question presented, therefore, is, has the State of New York the right to erect a barrier all around its boundaries, and say to the residents of other States: "You shall not come into New York to sell or sell in New York stocks of foreign corporations unless you pay a tax on all such sales."

Decisions of this Court show that this tax Act Violates the Commerce Clause of the Constitution.

Chief Justice MARSHALL, in *Gibbons vs. Ogden*, and *Brown vs. Maryland*, cited below (*infra*, p. 40), said: "Commerce is intercourse."

Drummer Cases.

It has been repeatedly held by the Supreme Court of the United States that when a drummer goes from one State into another to sell there goods *situated in the State from which he came, or outside of the State in which the sale is made*, the State where the drummer seeks to effect such sale cannot levy a tax upon the drummer, or upon the sale, or upon the *privilege or right to make the sale or upon the contract of sale*, in any form or to any extent, "not so much as the division of the twentieth part of one poor scruple," because to do so would be to interfere with interstate commerce.

Robbins vs. Shelby County Taxing District, 120 U. S., 489.
Corson vs. Maryland, 120 U. S., 502.
Asher vs. Texas, 128 U. S., 129.
Stockard vs. Morgan, 185 U. S., 27 (1902).

And here in view of the position of the learned Court of Appeals as to power and jurisdiction of the State (Rec., pp. 53, 57) it is important to note that in the Drummer cases the sale or contract of sale was held to be inter-state commerce although the parties to the sale (the drummer and the purchaser) were within the State, and although the goods sold or agreed to be sold were not within the State and might never come within the State.

And note that in the Drummer cases the tax was not on *transportation* but was on the *sale*.

(See Drummer cases more fully, and extracts therefrom, *infra*, pp. 53, 54).

The Telegraph Cases.

The case of *Telegraph Co. vs. Texas*, 105 U. S., 460, holds that inter-State telegraph messages are commerce and as such are

beyond the power of the State to tax them in any form. Texas required every chartered telegraph company doing business in the State to pay a tax of one cent for every full rate message sent and one-half cent for every message less than full rate. The Telegraph Company sent over its lines through its offices in Texas 169,000 full rate and 100,000 less than full rate messages, a large portion of them going to places outside of the State. The Company neglected to pay the tax and the State brought suit to collect it. The Company defended on the ground that the imposition of the tax violated the commerce clause of the Constitution. The Supreme Court of the State sustained the law and directed judgment for the full amount without any reduction for messages sent out of the State. That judgment was reversed by the Supreme Court of the United States, which held that

"A Telegraph Company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. Both companies are instruments of commerce *and their business is commerce itself*" (p. 464).

This is a tax on the messages, "As such, so far as it operates on messages sent out of the State, it is a regulation of foreign and inter-State commerce and beyond the power of the State" (p. 466).

Observe here that contrary to the opinion of the Court of Appeals (Rec., p. 55), no property was brought or contemplated to be brought into the State or sent out of the State. The basis of the decision of the Supreme Court of the United States is, that communication by telegraph between citizens of different States is itself commerce. A large proportion of the business of the Telegraph Companies are what they denominate social messages, and it makes no difference whether the message is sent out of the State or between States, or whether it relates to a business transaction or to matters entirely social, it is commerce, it is intercourse. A communication by telegraph or by telephone may result in a contract of sale and it frequently does make such a contract. Is such a contract taxable? Of course not, because such a contract is part of inter-State commerce.

The same principle applies to inter-State telephone messages (see *Muskogee National Telephone Co. vs. Hall*, 118 Fed. Rep., 382, U. S. Circuit Court of Appeals, 8th Circuit, October 27, 1902).

If a man is free to send a telephone or telegraph message into a State such message making, for example, a contract of sale, so also for precisely the same reason he is free to come into the State and

to make there a sale, either orally or in writing, at least so long as the property sold is not situated within the State; and neither the property sold can be taxed, because it is outside of the jurisdiction, nor the non-resident of the State because he is outside of the jurisdiction and comes into it under the protection and guarantee of the commerce clause of the Constitution, and the sale itself is not taxable because it is a part of the commerce or intercourse or communication which he has a right to make freely and without being taxed.

Equally in point and equally decisive in principle are the *Ferry Cases* referred to (*infra*, pp. 50, 51).

IT IS THUS SETTLED *that if Hatch, of Connecticut, had sold in New York, cotton in Virginia, or corn in Wisconsin, it would be interstate commerce and not taxable. Precisely the same principle applies to his sales of foreign shares.*

When, therefore, a resident of another States goes into the State of New York to sell stock of a foreign corporation, this is interstate commerce. A *sale* is emphatically *commerce.* This is *interstate* commerce because neither the seller nor the thing sold are wholly within the State of New York.

The present case differs from the Drummer or commercial agency cases above cited in that in those cases the things sold may have been things that might be brought into the state which undertook to levy the tax, while in the present case the thing sold, namely, the capital stock, that is, *the shareholder's interest in the foreign corporation,* cannot be brought into the State of New York. But this fact does not make the transaction any the less interstate commerce; for interstate commerce includes the commerce between the people of the various states and is not restricted (as erroneously held by the New York Court of Appeals, Rec., p. 55), to the case of a physical transportation from one state to another of the thing sold. Consider, for example, the vast commerce that takes place between the people of the different states in agricultural commodities, such as grain, cotton, wool, lumber, oil, sugar, etc., where the thing sold remains in elevators, warehouses and other storage places, and is not transported every time a sale takes place. Such sales nevertheless may be interstate commerce.

The fundamental thing, and the thing which the commerce clause

of the Constitution was intended to protect, was *freedom of commercial intercourse* between the people of one state and those of any other state. This means freedom to buy and sell not merely things that may be transported from one state to another, but also things which in their nature cannot be transported from one state to another; as, for example, stocks in foreign corporations, or lands or other property whose *situs* is fixed. The state where such fixed property is located, of course, has the right to tax such fixed property the same as any other property within its borders; but no other state has the right to tax such fixed property or to tax its sale when made by non-residents of such other state.

As to all foreign and interstate commerce the Federal Constitution establishes an "open door" which no State can either close or obstruct.

The Non-resident Relator's Sale of Foreign Shares Essentially Interstate Commerce.

BRINGING INTO THE STATE physically *something sold is not necessary to* INTERSTATE COMMERCE. The opinion of the learned Court of Appeals (Rec., p. 55), that commerce under the Constitution is limited to the transportation and interchange of physical property "in one State for property in another State," &c., is in direct conflict with many decisions of this Court as to what constitutes "commerce" in the sense of the commerce clause of the Constitution (*Infra*, pp. 31, 37 and cases cited, *Supra*, p. 28). The Drummer cases and the Telegraph cases and other cases settle this (see *infra*, pp. as to what is "commerce" in the sense of the Constitution). Communication is a part of commerce, and so is communication by word of mouth when Hatch came to New York, or by letter in other cases. Such communication may result in a sale, and all of this is interstate commerce.

New York has no right to say that Hatch shall not come into New York or to tax him in any form for doing so. TRAVELLING IS COMMERCE, and Hatch has a right to come into New York and a right to talk when he gets there, and a right to talk about property in other States, and to sell in New York his property located in other States. New York has no jurisdiction over such property and no right under the Federal Constitution to interfere with Hatch coming to New York to hold conversation there, resulting in

the sale there of Hatch's property in other States. That traveling between States is interstate commerce, is clear, and has never been questioned. This is assumed by all of the attempts that have been made by Congress to regulate interstate passenger business.

New York is in the attitude of saying: "We have a right to tax any citizen of another State who sells in New York lands situated in other States, or cotton, grain, lumber, coal or any other commodity situated in another State, and to levy such tax on sales in New York of any of these things, though they are situated in other States, and may never come into New York." For example, on the Produce Exchange in New York occur daily, sales of grain and other produce that never come into New York at all, but are shipped from other States to various parts of the world. The same thing is true as to cotton, which is sold in New York, but which may be sent from Galveston, New Orleans, Charleston or Savannah direct to Europe or to Massachusetts or Pennsylvania. In many of these instances it is never contemplated that the thing sold shall be brought into the State of New York, and yet, in order to hold this stock tax valid, as respects stocks in foreign corporations, New York claims (and the Court of Appeals in the judgment now under review has sustained the claim), that it has the right to tax all such sales made in New York of grain, cotton or other commodities, though they never come inside its boundaries.

The Court of Appeals said in its opinion that only transportation is commerce. But this statement is contrary to many decisions of this court. In the *Drummer cases* the tax was not on the transportation, but on the sale. In actual practice, in interstate commerce, goods are sold over and over again with but one transportation, and goods are sold over and over again when they are left in warehouses, without any transportation at all taking place. The proposition of the Court of Appeals is that all these transactions which take place between the citizens of different states, and which amount to hundreds of millions if not thousands of millions of dollars annually, and constitute the great commerce of this country, are not commerce at all, and are not protected by the commerce clause of the constitution, merely because there is not an actual transportation of the goods every time that a sale takes place.

Business could not be carried on, as it now is, under the protection of the commerce clause of the constitution if in order to receive such protection it was necessary every time a sale took place of grain or wheat in an elevator or of cotton or any other commodity in a warehouse, the goods must be transported back and forth between the states.

But it is immaterial whether the property sold is brought into the State of New York or not, for if the sale or contract of sale is inter-State Commerce the right to deliver is, of course, implied, and the State cannot tax the *Sale* or the *Contract* of sale (See authorities, *infra*, pp. 43, 44).

Hundreds if not thousands of factories and mills producing all kinds of goods are situated outside of the State of New York, but have selling agents who make sales in New York City of such goods. The goods themselves, however, in a very large portion of these sales, never come to New York City, but are shipped from the States where they are situated to various States all over the country and to foreign countries. Under the decisions in the Drummer Cases such sales are clearly not taxable by the State of New York. This is also expressly so held in *Stockard vs. Morgan*, 185 U. S., 27; *infra*, p. 55). This commerce is authorized and protected by the Commerce Clause of the Federal Constitution, and the State of New York has no right or power to interfere with it by taxing or attempting to tax such sales. The amount of such sales in the City of New York is at least hundreds of millions of dollars annually, and if the State of New York were permitted to tax these sales such tax would yield untold revenue to the State; and if this tax on stock sales should be upheld as not being a violation of the Commerce Clause of the Constitution, precisely the same reasoning on the part of the legislators of the State of New York which led to the adoption of this statute taxing stock sales would or might sooner or later lead to a tax on such sales made in New York of goods manufactured outside of New York, which never come into the State of New York. This tax on sales in New York of stock of foreign corporations, at least by non-residents, is open to the constitutional objection that it violates the Commerce Clause of the Constitution.

THE COMMERCE CLAUSE *of the Constitution intended to prevent any such interference with commerce.* New York City stands in a favored location as a commercial centre. As to all foreign and inter-State

commerce the City of New York belongs to the Nation and not the State of New York.

The learned State Attorney General in the brief in the Appellate Division (p. 3) says: "Easily 75 per cent. of all stocks in the United States are sold in the New York Stock Exchange."

This is true because commerce is free and New York reaps the benefit of this free commerce, but if she succeeds in taxing such sales and persists in laying foreign and interstate commerce under tribute, her commercial supremacy will surely decline. Retaliation or imitation by other States is easy and New Jersey, Pennsylvania, Massachusetts, Illinois and other States especially those having large commercial cities will enter into competetion by adopting the like policy and extending it to agricultural and other products. Imagine for example the enormous revenues which Chicago could extort from the commerce of the country by levying a tax on all sales of grain in that city, wherever such grain might be.

But why go to Chicago for an example? If the present experiment of taxing sales of stock succeeds, New York has only to extend the act and include all sales on the Produce, Oil, Mining, Cotton and other exchanges, and thus support its entire State government by bleeding the commerce of the whole country.

Not only so, but if the present experiment of taxing sales of stocks succeeds, New York not only may extend the act so as to include all sales of wheat, corn, cotton, oil, coal, sugar, coffee, tea and other commodities, but in fairness to the holders of stocks of corporations and to the Stock Exchange, New York is in duty bound to tax sales of these other commodities as well as sales of all shares of stock. In another part of this brief (POINT I.) the inequality of this tax law, which arbitrarily selects the sale of a particular commodity as the object on which this tax is levied, is presented as an arbitrary, unjust and unconstitutional discrimination, contrary to the fourteenth amendment, and we will not here repeat the arguments in support of that proposition. The point we make here is that not only may New York levy such tax on sales of such other commodities, if this present tax is held valid, but that in all fairness to the different interests represented in the state, New York is in duty bound so to extend this tax on sales as to make it cover sales of these various other commodities.

The other States and the people of other States have, under the Federal Constitution, rights in New York City, a right to go there and a right to do business there, both with the citizens of New York and the citizens of other States and with foreign countries, and the State of New York cannot stand as a robber baron of the Middle Ages and say to all comers: "You shall not buy or sell here unless you pay a tax on all such sales, though the property bought and sold is not situated in the State of New York."

THIS TAX *is only a beginning of interference with interstate commerce.* A more insidious and dangerous attack on free commerce cannot be conceived. Sustained, and the fatal contagion will rapidly spread throughout the different States of the Union. If it succeeds, other States will put on similar taxes, not only on stocks, but on all sales within their borders of all kinds of manufactured goods, grain, cotton, wool, coal, lumber, etc., without regard to the locality of the thing sold. If this be permitted, a man cannot go, as the Federal Constitution contemplates that he shall be able to go, from one end of this great country to the other, and buy and sell between States freely and without being met by any tax barrier at the boundary of a State, but he will be hindered and prevented by these taxes and tax barriers from finding a market for his property wherever he pleases.*

We do not say that when the transit is ended and goods have come into a State, they cannot be taxed like other property in the State, and such tax may then take the form of a tax on a sale of such goods, because then the goods are within the State and are part of the general mass of property within the State, and are liable to be taxed as other property within the State. But before such goods come in, a tax on a sale of them made by a non-resident is a tax on interstate commerce and is void.

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*The insertion of a few words in the present section 315 of the TAX LAW would make the same applicable to wheat, cotton, corn, etc. The simple insertion of the words italicised in brackets in section 315 as quoted below would accomplish such a purpose:

"SECTION 315. Amount of Tax.—There is hereby imposed and there shall immediately accrue and be collected a tax as herein provided, on all sales, or agreements to sell, or memoranda of sales or deliveries or transfers of [*corn, wheat, cotton, sugar, oil or coal where the amount or value is* $100 *or over, on each* $100 *of such amount or value or fraction thereof, two cents, and on all*] shares or certificates of stock in any domestic or foreign association, company or corporation," etc.

It will not do to say that this tax is justified, because IT IS A TAX TO REIMBURSE THE STATE FOR PROTECTION TO ANY PROPERTY WITHIN THE STATE. The stock certificates are not property within the State, or if they were, the tax is not levied on the stock certificates, but is levied on all sales of stock without regard to any question of certificates. When there is no stock certificate and yet there is a sale of stock, there is obviously no mere certificate even to be protected.

The tax is upon the *sale* of shares of stock. It is imposed on every sale even if there are no certificates or none delivered to the purchaser (Secs. 315, 317).

And if the shares are sold the tax is due though no certificates ever existed or though no certificates were ever delivered.

It is impossible to hold that the Act is valid if the *certificates* for the shares sold were delivered by Hatch but that the Act would not be valid if he had sold the *shares* and had not delivered any certificates for the shares sold. Hence the presence and delivery in the State of the certificates were wholly immaterial.

Nor will it do to say that the tax is justified because of the PROTECTION AFFORDED BY NEW YORK TO PERSONS LIKE HATCH COMING WITHIN ITS BOUNDARIES; for the same reasoning would have justified the tax on Drummers, which has been at least four times held invalid by the Supreme Court of the United States.

But as a matter of fact, all the protection which New York gives, is compensated for by other taxes. If a safe deposit company keeps stock certificates safely within its vaults, such company pays a tax on its real estate, or if not, it pays rent and its landlord pays a tax on the real estate, and the deposit company, if it is a New York corporation, also pays a corporation tax, and perhaps also a personal property tax. So also a broker, who acts as an agent to sell stock, pays taxes on his real estate, or what is the same thing, pays rent, and his landlord pays taxes on the real estate, and the broker also pays taxes on his personal property like other citizens.

The things sold in the case of stocks of foreign corporations lie wholly outside the State of New York, and receive no protection from New York. So also would it be with land outside the State of New York, or grain, or cotton or other commodities outside of said State.

Opinion of the Court of Appeals on Commerce Clause considered and shown to be Unsound and Contrary to the Drummer Cases and Other Cases Decided by United States Supreme Court.

In the argument in the Appellate Division the learned District Attorney (p. 5), said :

" The power to tax arises both because the person making the transfer is within the State, and secondly, because the contract is made within the State and therefore subject to enforcement by the Courts. Hence the circumstance that the property conveyed lies without the State is immaterial."

This view was sustained by the Appellate Division (Record, p. 23), and also by the Court of Appeals (Record, pp. 57, 58), which rested its judgment on this ground.

The fatal vice of this argument is that it overlooks the commerce clause of the Constitution. Equally were the drummers within the State where they made their contracts for the sale of articles not in the State, and yet the power of the State to tax the drummer or the sale was denied because the transaction or contract of sale was interstate commerce and as such withdrawn from the jurisdiction and power of the State to tax in any form or to any extent.

THE COURTS BELOW said in their opinions (Rec., pp. 23, 57, 58), that this statute taxes only sales in New York, and therefore it does not interfere with interstate commerce. This is no answer to the objections under the commerce clause of the Constitution. Such an answer might also have been made in the numerous drummer cases ; for the sales in those cases were made within the States that endeavored to levy the tax and this Court held such tax invalid, because, though the sales were made within those States, the property sold was situated outside those States and the selling of it was interstate commerce. Furthermore, this is not a question as to the place in which a contract of sale is consummated, but whether the transaction is interstate commerce. Under the rules and principles of common law, the sales in the drummer cases were consummated and became effective and binding in Tennessee, Texas and other States where the drummers made their sales, but the transaction was nevertheless inter-

state commerce (See *Stockard vs. Morgan*, 185 U. S., 27, and other Drummer Cases).

Moreover, it does not appear that the Court in these drummer cases made any point of the fact that the commodities sold could or must come into the State where sold. On the contrary, the practice is well settled and well known of a firm, say in Memphis, Tennessee, buying by sample, or otherwise at wholesale, from a drummer for a firm in New York, Philadelphia, Cincinnati or Chicago, and when the goods are shipped, they are shipped not to Memphis at all, but are shipped to the persons in other States to whom such wholesale firm in Memphis has sold them. So complex are the movements of commodities and the dealings in commodities, as between States and the people in the various States, that there is no presumption that when a man purchases in one State a large quantity of a commodity, situated in another State (as is usual where the sale is by sample, as in the drummer cases), the commodities themselves will ever be shipped into the State in which the sale was made. **The thing and the only pertinent thing in these drummer cases was that there was a sale in one State of a commodity which was situated in another State and that such sale constituted interstate commerce and was not taxable by the State in which the sale was made.** So the sale of stocks in foreign corporations made in New York by non-residents of New York are interstate commerce, and are not taxable by New York.

THIS IS ONE COUNTRY AS TO COMMERCE and there are no barriers at State lines and no State can erect a tax barrier to prevent the citizens of any other State from coming in to sell there freely and without tax property situated in other States. This is what the drummer cases decided.

A tax on a sale of property is a tax on the property itself ; and there is no reason why the State of New York should be permitted to tax property not in New York, merely because Hatch, the owner, comes into New York, which he has a right to do under the Federal Constitution, and sells there his property situated in another State, which also he has a right to do under the Federal Constitution.

The Transaction Set Forth in the Criminal Complaint in This Case (Rec., pp. 6, 10) **is an Interstate Commercial Transaction, pure and simple, Within the Established Meaning of the Commerce Clause of the Constitution.**

The Attorney-General and the District Attorney both insisted below that " the stock transfer tax is not a property tax "; " that the tax is upon the act of transfer and not upon the property "; " that it is tax upon the transaction of selling shares of stock "; that " it is a tax not on property, but merely on the exercise of a privilege of transfer," &c., &c.

This view of the act was adopted by the prevailing opinion of the learned Appellate Division. The language of Justice LAUGHLIN on this point is as follows :

" The learned Attorney-General and his associate do not seek to sustain the law as a tax on property. They contend that it is an excise tax or stamp duty upon the transaction or transfer of the certificates of stock, the amount of the tax depending upon the extent of the business ; and such literally it appears to be " (Rec., p. 23).

And such is also the opinion of the Court of Appeals, which says that the tax is not

" in substance a tax on property, but, as we have held, it is in fact only on the privilege of transfer " (Record, p. 56).

As if there was some magic force in the words " excise tax " or " stamp duty " or " tax on the privilege of transfer," which enabled such a tax or duty to be levied on a transaction of interstate commerce, when all other forms of taxation on such commerce are prohibited by the Constitution. That prohibition is against taxation of interstate or foreign commerce in any form whatever.

Indeed, it is precisely because the tax is laid " *upon the transaction* " set out in the criminal complaint against Hatch that such tax, call it " excise tax " or " stamp duty," or " transfer tax " or whatever other name you will, is prohibited by the Federal Constitution.

In their shortsighted, narrow and selfish policy, the authors of this act seeking to levy the largest possible amount of tribute upon

the commerce of the country adopted the scheme of all others most plainly obnoxious to the constitutional interdict, viz.: to tax every sale, every transaction resulting in a sale of shares, no matter where the seller has his domicil, or where the property sold has its legal *situs* or actual location. By taxing the transaction of sale or the right to make it the authors of this act seek to reach and to interfere with commerce *in the egg*, in the very act of birth.

If such legislation as applied to Hatch's case is not in conflict with the Federal Constitution commercial freedom in this country is at an end. And the imperial City of New York, emphatically the child of free commerce with foreign nations and with the forty-five States of the Union, will in the end be the greatest sufferer. Commercial freedom under exclusive national control, that is, commerce unfettered by State taxation or exactions in any form is the constitutional right of every State of the Union, and of every citizen in every State. It is, moreover, the main source of our amazing growth and prosperity both national and State.

Consider for a moment the vast amount of business done in New York, not only upon the various exchanges but among all the citizens by private wires, by cable, telegraph, telephone and letters ordering the sale and purchase of stocks and all sorts of property amounting to millions upon millions every month, all this largely because such transactions are free from State taxation or trammels.

Like Venice of old—"the trade and profit of the City consisteth of all nations" (*Mer. of Venice*), so the trade and profit of the City of New York consisteth not only of all nations, but of all of the forty-five States of the Union, our internal Commerce greatly exceeding our foreign commerce. And let the salutary lesson be remembered that when Venice lost her Commerce her decay began, her supremacy was ended, and her greatness passed away. Let the economic truth also be remembered that free commerce giveth life and prosperity, and that all restraints and burdens upon Commerce are essentially and ever unwise and harmful.

Sustain this act and it will surely be followed by others imposing "excise taxes" and "stamp duties," and "transfer taxes" so-called on sales of grain, oil, cotton, sugar and other great commodities though not within the State, and this shortsighted, narrow and selfish policy will drive business from tax-burdened New York to Jersey City, Boston, Philadelphia, which will leave sales of shares free and untaxed. It will soon be as easy to reach an exchange in Jersey City as on Wall street.

Even if these propositions of the State's Attorneys and of the Courts below be conceded, Hatch's sale set out in the complaint was a commercial transaction, and on the special facts stated in the complaint such sale was interstate commerce, pure and simple—the property (the shares) sold being beyond the jurisdiction of New York, and the owner (Vendor) being both domiciled and resident in Connecticut (Rec., pp. 1, 15).

What is "Commerce" in the Sense of the Commerce Clause of the Constitution?

The decisions of the Supreme Court of the United States makes the answer to this question very plain.

MARSHALL'S *famous definition of commerce:*

In the great case of *Gibbons vs. Ogden* (9 Wheat., 1) the supremacy of the national government over foreign and interstate commerce was first distinctly established. That case overthrew the long line of legislation in the State of New York confirming to *Livingston* and *Fulton* the exclusive right of using steamboats upon all the navigable waters within the limits and jurisdiction of New York. The Supreme Court of the United States decided that the power to regulate commerce given by the federal constitution included the power to regulate navigation, holding that the power to regulate commerce did not stop at the boundary of the State. Chief Justice MARSHALL, speaking for the Court, defined for the first time the meaning of the word "commerce" as used in the Constitution. He said it includes navigation; it includes trade and commerce. But he went further, and in an expression which shows his wonderful prevision declared that *commerce was intercourse itself.* He formally asserted the doctrine so extensive and beneficent in its future operation, that "wherever commerce among the states goes the judicial power of the United States goes to protect it from invasion by State legislature." His language relating to the commerce clause of the constitution is as follows (9 Wheat., pp. 189, 190):

> "The words are, 'Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.'
>
> "The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of

enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. **Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."**

Again, he says (p. 194) :

> "To what commerce does this power extend? The Constitution informs us 'to commerce with foreign nations, and among the several States, and with the Indian tribes.' It has, we believe, been universally admitted that these words comprehend *every species of commercial intercourse* between the United States and foreign nations."

Mark his words, "every species of commercial intercourse." He continues :

> **"No sort of trade can be carried on between this country and any other, to which this power does not extend.** It has been truly said that commerce, as the word is used in the Constitution, is a unit, every part of which is indicated by the term.
>
> "If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it."

He also said : **"The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it."** Equally true of interstate commerce. It belongs to every state.

In *Brown vs. Maryland*, 12 Wheat., 419, MARSHALL, C. J., said : "COMMERCE IS INTERCOURSE; ONE OF ITS MOST ORDINARY INGREDIENTS IS TRAFFIC," &c., &c.

A late case sums up the long line of Federal decisions on what constitutes interstate commerce as follows :

Interstate commerce comprehends "intercourse for the purposes of trade in any and all its forms, including transportation, pur-

chase, *sale and exchange of commodities between the citizens of different States*, and the power to regulate it *embraces all the instruments by which such commerce may be conducted*" (*Hopkins vs. United States*, 171 U. S., 578, at p. 597).

This definition precisely covers the case of Hatch, the relator in the present case. The sale of his foreign corporation shares in New York was interstate commerce, and the two certificates delivered were the mere symbols or instruments by which such commerce was conducted.

The true view of a *certificate* of stock in a corporation is that the certificate is a mere evidence of title, just as a deed would be, or a lease, or a contract, or any other paper. These are all merely *instruments* used in connection with commerce or in connection with interstate commerce, and no one of these things is property within a state merely because the paper happens to be there. All of these papers, so far as they are evidences of title to property which is outside the state are identified with that property. So far as such property outside the state is the subject of interstate commerce, these *instruments* which are part and parcel of that property, are entitled to the same protection under the commerce clause of the constitution that the property itself is entitled to. In the language of Mr. Justice PECKHAM in *Hopkins vs. United States*, 171 U. S., 578, 597, commerce includes "all the instruments by which commerce may be conducted."

In the *Lottery Case*, 188 U. S., 321, this Court considered the Commerce Clause of the Federal Constitution and reviewed numerous decisions which had theretofore been made. The Court held that under this Commerce Clause Congress had power to prohibit the carrying of lottery tickets from one state to another. Mr. Justice HARLAN, giving the opinion of the Court, said (p. 345):

"What is the import of the word 'commerce' as used in the Constitution? It is not defined by that instrument. Undoubtedly, the carrying from one State to another by independent carriers of things or commodities that are ordinary subjects of traffic, and which have in themselves a recognized value in money, constitutes interstate commerce. But does not commerce among the several States include something more? Does not the carrying from one State to another, by independent carriers, of lottery tickets that entitle the holder to the payment of a certain amount of money therein specified also constitute commerce among the States?" * *

After referring, among others, to the case of the *Western Union Tel. Co. vs. Pendleton*, 122 U. S., 347, 356, Mr. Justice HARLAN said that the court recognized the commerce with foreign countries and among the States which Congress could regulate as including not only the exchange and transportation of commodities, or visible, tangible things, but the carriage of persons, and the transmission by telegraph of ideas, wishes, orders and intelligence. See also *Ratterman vs. Tel. Co.*, 127 U. S., 411, and *Leloup vs. Port of Mobile*, 127 U. S., 640.

The learned Justice thus sums up the result of the prior decisions of this Court (p. 352):

"This reference to prior adjudications could be extended if it were necessary to do so. The cases cited, however, sufficiently indicate the grounds upon which this court has proceeded when determining the meaning and scope of the commerce clause. They show that commerce among the States embraces navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph. They also show that the power to regulate commerce among the several States is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States; that such power is plenary, complete in itself, and may be exerted by Congress to its utmost extent, subject only to such limitations as the Constitution imposes upon the exercise of the powers granted by it; and that in determining the character of the regulations to be adopted Congress has a large discretion which is not to be controlled by the courts, simply because, in their opinion, such regulations may not be the best or most effective that could be employed."

Right to Deliver Implied.

The right to sell stocks of foreign corporations clearly implies the right to deliver pursuant to such sale, *tax free*, certificates, which are the mere paper *evidences* of ownership, and are not themselves the property sold. They are part of the instruments of interstate commerce, as a telegram or a letter would be.

"Delivery," says Judson (Taxation, Sec. 146), "is essential to a sale. The agent delivering goods sold by a drum-

mer or commercial traveler is therefore also exempt from State taxation. Thus the salaried distributing agent for a publishing firm of another State is entitled to distribute the books sold through another salaried agent, and a *license cannot be exacted without an unlawful interference with interstate commerce* (Huntington v. Mahan, 142 Ind., 695). It is immaterial that the goods are to be sold on the installment plan. The right to sell implies the obligation and right to deliver (*In re* Spain, 47 Fed. Rep., 208. See, also, Laurens v. Elmore, 55 S. C., 477; 33 S. E. Rep., 560; Pegues v. Ray (La.), 23 So. Rep., 904)."

Presence in New York of the Certificates of Shares Immaterial.

The circumstance in this case that Hatch delivered certificates for the shares in the foreign corporations sold by him is immaterial as to the question of the power of the State to tax. The Stamp Act applies by its terms (Sec. 315) "to *all* sales or agreements to sell or deliveries or transfers of shares *or* certificates of stock in any domestic or foreign corporation," &c.

Under the statute if Hatch had sold these same shares in New York but delivered no certificates or delivered the certificates in Connecticut he would be liable under the act to pay the two cents on each $100 face value.

In the Appellate Division two grounds were taken by the learned Attorney-General and his associates. They said

1. That

"the tax is a tax upon the right of transfer, and it is not necessary to its validity that the property transferred should be within the jurisdiction of the State." (Brief of Mr. District Attorney JEROME, p. 4.)

[This ground was sustained by both Courts below and made the basis of their judgments.]

2. That the legal *situs* of shares of a foreign corporation for purposes of taxation is where the certificates for the shares actually are, saying:

"That they [stock certificates] are in no respect different from promissory notes, bills of exchange, watches, jewelry or any other

portable kind of personal property which can be transferred at a moment's notice and by delivery from hand to hand," &c. (First Brief of Attorney-General MAYER, p. 33.)

So far as the argument of the learned Attorney-General and his associates or the opinions of the Courts below place the validity of this act, as applied to the special facts of this case, upon the presence or delivery in this State of the two certificates of stock, that argument has no foundation upon which to rest. It has no foundation in the general principles of the law and is in conflict with decisions of this Court (*ante*, p. 23) as well as other Courts including those of New York (*ante*, p. 21), as to the nature of corporate shares or of the certificates as mere evidences of title thereto, and it has no foundation in the language or purpose of the act, which was to reach any and every sale of shares *or* certificates *or* deliveries of shares or certificates in this State. The tax is upon the *sale, and is imposed even if there are no certificates.* Hence a certificate is not the thing taxed. Will the other side admit that if Hatch had merely sold the shares in New York, but retained and delivered the certificates in Hartford or Jersey City, or if there had been no certificates of the stock, he would not have violated Section 315? If they will not admit this, they cannot insist that the bringing of the certificates for shares to New York brings with them the shares or invests the State of New York with the power to tax Hatch, a non-resident, for making a sale of the shares in the non-resident corporations.

New York Stamp Act is not, as is held by the Court of Appeals, valid as a tax on the right or privilege to make a sale or transfer.

The opinion of the Court of Appeals (Rec., p. 56), places the validity of this act upon the *right or privilege of the State of New York to tax the sale or transfer* by Hatch of the shares of the Wisconsin or Virginia corporation.

The answer is complete. And that answer is that Hatch derived no right or privilege whatever from the State of New York to make such sale or transfer, but on the contrary this precise, this exact right or privilege—to wit, the right or privilege to sell his shares—was secured to him by the Commerce clause and other provisions of the Federal Constitution, and this right or privilege,

being inter-State commerce, is beyond the right of the State to tax in any form,

"for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

Lyng vs. Michigan, 135 U. S., 161, 166, cited *infra*, p.

This point as to privilege is also covered by the case of *Crutcher vs. Kentucky*, 141 U. S., 47 (1890). The Court says :

"The law of Kentucky, which is brought in question by the case, requires from the agent of every express company not incorporated by the laws of Kentucky a license from the auditor of public accounts, before he can carry on any business for said company in the state. This, of course, embraces interstate business as well as business confined wholly within the state. It is a prohibition against the carrying on of such business without a compliance with the state law."

The law was held to be unconstitutional, the Court, BRADLEY, J., saying (page 56):

"If the subject was one which appertained to the jurisdiction of the state legislature, it may be that the requirements and conditions of doing business within the state would be promotive of the public good. It is clear, however, that it would be a regulation of interstate commerce in its application to corporations or associations engaged in that business; and that is a subject which belongs to the jurisdiction of the national and not the state legislature. * * * **To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States.** * * * **It has frequently been laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce. Would any one pretend that a state legislature could prohibit a foreign corporation—an English or a French transportation company, for example—from coming into its borders and landing goods and passengers at its wharves, and soliciting goods and passengers for a return voyage, without first obtaining a license from some state officer, and filing a sworn statement as to the amount of its capital stock paid in? And why not? Evidently because the matter is not within the province of state legislation, but within that of national legislation."**

It is said by the Court of Appeals that the sale of shares of stock is made in New York, and that the vendor and vendee in the present case were within the state when the sale was made; and the Court further states (Record, page 56) "It is in fact a tax only on the privilege of transfer." The Court of Appeals in its opinion (Record, page 53) stated its position on this subject as follows:

"The question is whether the state has jurisdiction to impose a tax on a certain class of contracts when made within its territorial limits? Jurisdiction over the persons who make the contract does not depend on their residence, but on their presence within the state when the contract is made. Jurisdiction over property depends on its physical presence here, or if it is personal property, either its presence here or the residence of the owner here. The fiction of the common law, *mobilia sequuntur personam*, has no foundation in the Constitution and does not control the legislature, which rejects or adopts it at will as applied to the subject of taxation. When two citizens of Connecticut come into this state and make a contract here, to be enforced here, both they and their contract are subject to its laws, and they are not only entitled to the protection thereof, but are under the same obligation to obey as if they were citizens. Such a contract is valid or invalid as our laws declare. When the law commands that if they, or any other persons, whether residents or not, make a certain contract here they must pay a certain tax for the privilege, the command is personal, addressed to them as persons then within the state, and is as binding on them as if they resided in the state. Their rights and their obligations in reference to such a contract are the same as if they were citizens, no greater and no less. The fact that the contract, though made here, may relate to property, real or personal, situated elsewhere, has no bearing upon the question. By coming into the state they subjected themselves to its laws and to its taxing power, so far as the making of such a contract is concerned. It is immaterial whether the contract is between residents or non-residents, or between a resident and a non-resident, for if it is made within the state it is subject to taxation by the state. This necessarily follows from the power of the state over the subject of taxation."

It appears not to have occurred to the learned Court of Appeals that precisely the same argument might have been made in support of the validity of the taxes attempted to be levied by the state of Tennessee and other states in the *Drummer cases;* for in all those cases it was true that the contract of sale was made within the state which attempted to levy the tax upon the drummer, and by persons within the state, and such contract was made under the common law or statute law of such state, and was to be construed

according to such common law or statute law of the state as being the law of the place of the contract. But this fact is not sufficient to enable the state to impose a tax upon interstate commerce. Consider, for a moment, the necessary result of any such argument as that which is stated above by the Court of Appeals. If this argument were sound, a tax could be levied upon every interstate sale by some state, because in every such sale there is a place of the contract, and the laws of some state govern in the construction of the contract. But it will not do to say that for this reason such a state has the power to levy a tax upon a sale which is a part of interstate commerce. This has been expressly and necessarily decided in the *Drummer cases*.

Let it especially be noted and remembered that the right of Hatch as a resident and citizen of Connecticut to make a sale in New York of shares in a foreign corporation is A NATIONAL RIGHT FULLY GIVEN BY THE COMMERCE CLAUSE AND OTHER CLAUSES OF THE FEDERAL CONSTITUTION. It is a right which the State of New York does not confer and cannot deny or regulate or touch except under the police power. This right in Hatch to sell the shares in question is a federal constitutional right whose exercise the State of New York cannot tax in any manner or to any extent.

The State of New York when she entered the Union surrendered the right to tax commerce among the States in any form. When, therefore, New York, by this stamp act, says she will levy a tax or duty on the right or privilege of conducting an operation of interstate commerce, she is attempting to tax a right which her laws do not create or confer and cannot deny or regulate.

The Court of Appeals quotes the case of *Orr vs. Gilman*, 183 U. S., 278, 289, and like cases (Rec., p. 54), in which the validity of an inheritance or succession tax was sustained upon the ground of "not being a direct tax upon property, *but a charge upon a privilege exercised or enjoyed under the laws of the State.*" This is true. State laws give the right to inherit or succeed to property on the death of the owner, and hence the State has the power to tax the right which the State creates and which, if it chose to do so, it could deny. How obviously inapplicable is any such principle to the case at bar. Hatch's right to make the ordinary and simple inter-State sale or transaction set forth in the complaint is not "*a privilege exercised or enjoyed under the laws of the State*" of New York, but on the contrary it is a right guaranteed to him by the Constitution of the United States

free from all State interference, regulation or taxation, and it is one which Hatch has the constitutional right to exercise and enjoy within the State of New York, not only without the consent but even against the will of the State, *tax free*. A State statute forbidding Hatch to make such a sale would be void; equally void is a statute levying a tax upon such sale.

The Appellate Division and the Court of Appeals both place the validity of this stamp act, as applied to Hatch's case, wholly upon the ground that the stamp tax is not upon property but upon a privilege exercised within and under the laws of the State of New York and hence New York may tax such privilege. The whole foundation of this conclusion falls when it is seen that the act for which Hatch is sought to be punished was the exercise of a right (not simply a *privilege*, but a *right*) fully given and guaranteed by the Federal Constitution, and in no sense created or conferred by the State of New York.

Under the New York act "the fact of a sale is alone regarded"; and when, as in Hatch's case, such sale is an interstate commercial transaction pure and simple the tax is upon that transaction and therefore void under the commerce clause of the Constitution. But if the tax be regarded as a property tax on the property sold (which both courts below disclaimed) it is also void, because the property is beyond the jurisdiction of the State.

Authorities and Illustrative Cases.

That the transaction of Hatch set out in the complaint is interstate commerce is shown by analogy in many cases decided by the Supreme Court.

Miller, Const. U. S., 80, where many cases are referred to.

It is a matter of common knowledge that the most efficient cause of the formation of the Union under the Constitution of the United States was the selfish and conflicting regulations of the different States in respect of commerce, each trying to secure an advantage over the others, there being no power in the Articles of Confederation to regulate or control this vital subject. Mr. Justice MILLER, a high authority on the Constitution, discusses the federal control over commerce in a striking way:

> "Notwithstanding for nearly one hundred years we have had in the Federal Constitution the declaration that Con-

gress shall have power to regulate commerce among the several States, there are at this hour upon the statute books of almost every State, laws violating that provision; **and there is no doubt that if that clause were removed to-morrow, this Union would fall to pieces, simply by reason of the struggles of each State to make the property owned in other States pay its expenses.** It was this tendency of each State to support its government out of taxes levied upon the property of other States or on the produce or merchandise which must go through one State to another, that more than any other one thing, compelled the formation of the present Constitution."

Miller, Constitution of United States, 81.

The learned author refers to many instances of such legislation in contravention of the commerce clause of the Constitution, for instance, the Statute of California imposing a tax on bills of lading for gold or silver carried out of the State (*Almy vs. California*, 24 How., 169) where as the State could not tax gold or silver exports, it artfully required 10 cents stamp on bills of lading for silver and gold); Statutes of New York and Massachusetts imposing taxes on alien passengers arriving in ports of those states (*Passenger Cases*, 7 How., 283; *Henderson vs. Mayor of New York*, 92 U. S., 259); Statute of Tennessee taxing drummers, (*Robbins vs. Shelby County, Taxing District*, 120 U. S., 489, and other like cases cited in this brief, *supra*, p. 27); statutes regulating the delivery of telegraphic dispatches in other states, (*Western Union Telegraph Co. vs. Pendleton*, 122 U. S., 347, *Telegraph Co. vs. Texas*, 105 U. S., 460). More than 125 cases in the Supreme Court of the United States construing the commerce clause of the constitution are carefully collected and cited in Mr. GUTHRIE'S learned work on the *Fourteenth Amendment*, 186, 187.

The Ferry Cases.

As to the want of power in a state to tax a non-resident on foreign shares or in respect of them, see *Gloucester Ferry Co. vs. Pennsylvania* (114 U. S., 196). Judson correctly states the case thus:

"The ferry-boats between Gloucester in New Jersey and the City of Philadelphia belonged to *a New Jersey company* and were registered in Camden, N. J. No property was

owned by the company in Philadelphia except the docks where the boats were landed and where they remained only long enough to receive and discharge passengers and freight. The Supreme Court reversing the Supreme Court of Pennsylvania (Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196), decided **that the ferry company was not taxable in Pennsylvania upon its capital stock. Its business was interstate commerce, and, whether this was conducted by individuals or corporations, the property employed in it could be taxed only where it had its taxable situs,"** that is to say, in New Jersey, the domicil of the company, and not in Pennsylvania.

Judson on Taxation, Sec. 196.

Although the Ferry Company owned a wharf in Philadelphia, at which its boats regularly landed and received and discharged passengers and freight and thus conducted its business in Pennsylvania, yet, inasmuch as such business was

" a necessary incident to, indeed a part of, their transportation across the Delaware River from New Jersey, *a tax upon such receiving and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between the two States involved in such transportation.*"

The Court further said :

" The character of the business was one of commerce. *Commerce among the States consists of intercourse and traffic between their citizens,* and includes transportation of persons and property and the navigation of public waters for that purpose, as well as the *purchase, sale,* and *exchange* of commodities," &c., &c.

Thus it was held that no State tax could be laid upon the passenger, or upon the business of interstate transportation, or upon the capital stock of the Ferry Company on the ground that it was doing business within the State, the Court saying :

" However great her power [that of the State] no legislation on her part can impose a tax on that portion of interstate commerce which is involved in the transportation of persons and freight, whatever be the instrumentality by which it is carried on."

" The tax imposed by the State of Pennsylvania was decided to be void, as being repugnant to the commerce clause of the Constitution " (per WHITE, J., in the *St. Clair County case* next cited, 192 U. S., 454, 465).

THE GLOUCESTER FERRY CASE, after thorough and critical reconsideration, was unanimously affirmed in *St. Clair County vs. Interstate, &c., Transfer Co.*, 192 U. S., 454 (1903). In this last case it was held that Illinois could not require the Ferry Company to pay a license tax for transporting railroad cars over the Mississippi River between Missouri and Illinois, although the Ferry Company owned in St. Clair County, Illinois,

"permanent landing places, with cradles and roadways leading thereto, from which it operated its steamboats and barges," &c.

These Ferry cases, as well as the Drummer cases and Telegraph cases, above referred to, cover, *and more than cover*, the case of Hatch. They establish what we all know to be the universal practice and understanding, that no State tax can be imposed upon Hatch for coming from his domicile in Connecticut to the State of New York. They establish that commerce among the States consists of intercourse and traffic between their citizens, and includes transportation, right of ingress and of egress, as well as the purchase, sale and exchange of commodities.

WE THEREFORE MAINTAIN :

1. *The tax created by this stamp act is a tax upon the transaction of buying and selling shares of stock, and if buying and selling are not commerce, nothing is commerce.*

2. *And if the thing sold is not within the State levying the tax, and the vendor is a citizen of another State, then such a sale or transactian is inter-State commerce and not subject to the State's taxing power, in any form or to any extent.*

If the Transaction set forth in the Criminal Complaint in this Case is an Inter-State Commercial Transaction, then it inevitably follows that as applied to this Transaction the New York Stamp Act is an Interference with Inter-State Commerce and therefore Void.

The settled rule is that Interstate Commerce cannot be taxed at all ; that any taxation of such commerce in any amount or in any form is an interference with it.

The principle and the reason for it are thus expressed by Chief Justice FULLER in the case of *Lyng vs. Michigan*, 135 U. S., 161, 166:

> "*We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form*, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, *for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress.*"
>
> Reaffirmed in the later case of Crutcher vs. Kentucky, 141 U. S., 47.

See, also, *Atlantic, etc., Tel. Co. vs. Philadelphia*, 190 U. S., 160 (1902), where Mr. Justice BREWER classifies the dicisions of this Court as to the taxation by states and their municipalities of persons engaged in inter-state commerce. He says that it is settled:

"2. No state can compel a party, individual or corporation to *pay for the privilege of engaging in interstate commerce*" (Citing the cases in this Court).

"3. This immunity does not prevent a state from imposing *ordinary property taxes upon property having a situs* within its territory and employed in interstate commerce" (Citing the cases).

"4. The franchise of a corporation, although that franchise is the business of interstate commerce, is, *as a part of its property*, subject to state taxation, providing at least the franchise is not derived from the United States" (Citing the cases).

And it is immaterial that the State, although the learned Court of Appeals seems to have thought otherwise (Rec., pp. 57, 58), lays the same taxes on domestic commerce that it attempts to lay on interstate commerce.

This principle has been frequently asserted and applied by the Supreme Court.

It is immaterial, therefore, that the New York Stamp Act attempts to impose the same tax upon sales of shares in domestic corporations, and that domestic and foreign corporations are treated alike. This principle is settled by the case of *Robbins vs. Shelby County Taxing District*, 120 U. S., 489, 497, where the Court disposed of a similar contention as follows:

> "It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic

and foreign drummers—those of Tennessee and those of other states; that all are taxed alike. But that does not meet the difficulty. **Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state.** This was decided in the case of the State Freight Tax, 15 Wall., 232.

> **"The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce. A New Orleans merchant cannot be taxed there for ordering goods from London or New York, because, in the one case, it is an act of foreign, and, in the other, of interstate commerce, both of which are subject to regulation by Congress alone."**

That is, if Hatch had sold cotton in *Virginia* or corn in *Wisconsin* it would be interstate commerce and not taxable. There is no difference between cotton and corn and foreign stock in those States. Right to deliver under such sales tax free is implied (*Ante*, p. 43).

The case is, therefore, essentially unlike the case of *Woodruff vs. Parham*, 8 Wall., 123, referred to by the other side, as that was the case of "simple tax on all sales of merchandise," domestic or foreign, within the jurisdiction of the State to tax, and not as here a tax on interstate commerce which is beyond the power and jurisdiction of the State to tax.

Cases Cited by Other Side Not Applicable.

Certain cases in the Supreme Court of the United States have been referred to as supporting the contention of the State in this case that its power of taxation extends to the sale set forth in the complaint against the relator.

Some of these are cases in which the State's power to tax was upheld because the *commercial transit was ended*, and the property taxed was at rest and actually in the State, or was mingled with the general mass of property in the State. Under such circumstances the tax became an ordinary tax upon property within the limits of the State.

Other cases are those in which an *occupation or privilege tax* has been sustained when the property has reached its destination in the State levying the tax. Examples of these classes of cases are *Woodruff vs. Parham*, 8 Wall., 123; *Hopkins vs. United States*, 171 U. S., 578, 597; *Brown vs. Houston*, 114 U. S., 622; *Am. Steel & Wire Co. vs. Speed*, 192 U. S., 500 (1904), cited by the Court of Appeals (Rec., p. 58), but such cases have no real bearing on the case of the present relator, a non-resident of New York, who sold property not within the State of New York.

On the contrary the present case falls within the principle of *Stockard vs. Morgan*, 185 U. S., 27 (1902), and prior cases.

In this case it was held as correctly stated by Mr. *Judson* (on Taxation) Section 145:

> "that parties who do business only for non-residents, that is, whose business is exclusively confined to soliciting orders from jobbers and wholesale dealers in the State as agents for non-resident parties, firms or corporations, are not subject to a privilege tax for conducting such business (Stockard v. Morgan, 185 U. S., 27; decided April, 7, 1902). [It would be the same if the non-resident owner made the sale in person.]
>
> The fact that a broker, as such, can transact a local business as well as a business for non-residents, does not determine the matter, and, if he confines himself to interstate business, he can do so without becoming liable to the tax (Following and quoting from Stratford v. Montgomery 110 Ala., 619)."

The Court said at page 37:

> "Although it is said in the opinion of the State court herein that the thing taxed is the occupation of merchandise brokerage, and not the business of those employing the brokers, yet we have seen from the cases already cited **that when the tax is applied to an individual within the State selling the goods of his principal who is a non-resident of the State, it is in effect a tax upon interstate commerce, and that fact is not in any wise altered by calling the tax one upon the occupation of the individual residing within the State while acting as the agent of a non-resident principal. The tax remains one upon interstate commerce, under whatever name it may be designated.**" [This exactly covers Hatch's case and shows that his sale was interstate commerce.]

> "It therefore is established," says Judson, *ubi supra*, "by this latest judgment of the court that commercial agents or brokers who transact business exclusively for non-residents, in soliciting purchases or sales, are not subject to a privilege or occupation tax for so doing."

And it is equally a tax upon interstate commerce if the sale is made by the non-resident principal himself, instead of by an agent.

We submit with the fullest confidence in its soundness that the cases referred to in this brief and especially the Telegraph, the Ferry and the Drummer cases, fully cover in principle the Hatch case, and that it is impossible to distinguish them on any solid ground.

Act Taxes Foreign Commerce.

The act is an interference with commerce with foreign nations.

The stock transfer tax law is also void under the Constitution of the United States for the reason that it undertakes to impose a tax upon the sale in the State of New York of stock of a corporation outside of New York, having no property in the State of New York, in all cases where the said stock is offered for sale in New York by persons who are not citizens or residents in the United States. The said law expressly includes "all sales of stock in any domestic or *foreign* association, company or corporation" (Sec. 315).

In other words, this stock transfer tax law attempts, among other things, to prohibit a citizen of Great Britain from making a sale, either himself or through his agent, in the State of New York, of shares of stock which he may own in any corporation, even though that corporation is incorporated under the laws of Great Britain or other States than New York and has all of its property in Great Britain or in other States than New York. Such a tax is a tax upon commerce with foreign nations as well as a tax upon commerce among the several States, and it is void as an attempt to interfere with commerce with foreign nations, for the same reasons that it is void as an attempt to interfere with commerce among the several States.

The leading case in the United States Supreme Court showing that a State cannot thus interfere with commerce with foreign

nations, is *Brown vs. Maryland*, 12 Wheaton, 419, above referred to (*supra*, p. 41).

The proposition here stated as to commerce with foreign nations is supported by the same reasoning and the same line of authorities that are set forth above under the heading that this statute is void as an attempt to interfere with commerce among the several States, and we therefore do not repeat here at length all of the said arguments and authorities.

A sale of shares of stock in the State of New York is emphatically commerce. Of this there can be no doubt. The sales and purchases of stock made in the City of New York by residents of Great Britain and Europe or by their agents here in New York amount annually to millions of dollars. Such sales and purchases between residents in Great Britain and Europe on the one hand and citizens of our own State on the other are commerce with foreign nations. Of this fact there can be no doubt. And yet this State Transfer Tax Law which the State of New York has presumed to enact is a direct, open and express attempt to interfere with this commerce with foreign nations by prohibiting it unless a tax is paid to the State of New York, and making such commerce a penal offense unless the tax is paid. This is an attempt on the part of the State of New York to regulate or shut off intercourse with foreign nations.

This attempt by the State of New York relates only to a tax on sales of shares of stock, but if a tax on sales of shares of stock is valid notwithstanding the provision of the Constitution of the United States which gives Congress exclusive jurisdiction to regulate commerce with foreign nations and among the several States, then the legislature of the State of New York may enact a similar law with reference to sales here of any other kind of property, as, for example, cotton, wool, sugar, tea, coffee, bonds and all kinds of commercial securities, etc.; in short, there is no end to the list of things, subjects of foreign commerce and interstate commerce, sales of which may be likewise taxed by the State of New York.

Let this Court sustain this law, the example will prove contagious, and stimulate the greed of the States and similar and kindred laws will everywhere be enacted. Who can tell where such pernicious legislation will stop or end?

Suppose every State should pass similar laws affecting sales and transfers of property which take place within their limits, including

among others, all transactions made by non-residents of the State whether such non-residents are citizens of other States or citizens of foreign countries. Can there be any doubt that this would be an interference with the freedom of commerce with foreign nations and among the several States?

OUR PROPOSITION IS THAT NO STATE has a right to erect any such barrier either to intercourse with residents of other States or to intercourse with residents of foreign nations. The body and the only body that can put up any such barrier is the Congress of the United States.

Suppose a citizen of Great Britain should come here to the City of New York and offer for sale and sell here shares of stock in the Northern Pacific Railroad Company, under this Transfer Tax Act he is told that he cannot make such sale without paying a tax to the State of New York, and that if he attempts to do so he is guilty of a misdemeanor and liable to fine and imprisonment. It is impossible to deny that this would be an interference by the State of New York with foreign commerce.

The Act is an Unit and Void in toto.

Therefore, this Act, so far as it applies to the sale by non-residents of foreign stocks in New York, would violate the Constitution of the United States, and the effect is that the whole act must fail since it cannot be for one minute supposed that the legislature would ever have passed the Stamp Act if it thought it could reach only the citizens of the State of New York and could not impose the tax as it attempted to do upon all foreign stocks sold in New York. It is well known that it was the purpose of those who passed this act to reach on the exchanges stocks of all corporations owned and held by non-residents of this State, and sold in this State. When the legislature of the State of New York has made this *act a unit, indivisible*, and in one and the same sentence imposed a tax on the sales or transfers of stocks of foreign corporations as well as domestic, even when owned by non-residents, the courts cannot make the act divisible and say, "Yes, it is void as to sales of stocks owned in foreign countries or owned in other States, and yet valid as to sales by residents here of stocks in domestic or foreign corporations." The courts cannot take out what the legislature has

put in and say that the legislature would have passed the act without the things that the legislature expressly put in.

That the New York Stamp Act in question if void as to foreign stocks sold in New York is void *in toto*, we refer to the following cases decided by this Court:

In *Henderson vs. Mayor of New York* (92 U. S., 259, 275), the Court held that the State had the power as a matter of police to obstruct the coming into the State of criminals, paupers, diseased persons, &c., but inasmuch as the law obstructed the migration of all (and not the objectionable ones only) it was decided to be void *in toto* as in conflict with the commerce clause of the Constitution.

So, in *Railway Co. vs. Husen*, 95 U. S., 465, this Court held that a law of Missouri which was not restricted to diseased cattle, but prohibited the driving of all Texas cattle through the State of Missouri, was void *in toto* because it was in conflict with the commerce clause of the Constitution.

The Court said (page 473):

"Tried by this rule, the statute of Missouri is a plain intrusion upon the exclusive domain of Congress. It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, 'You shall not bring into the State any Texas cattle or any Mexican cattle or Indian cattle, between March 1 and Dec. 1 in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the State or not; and if you do bring them in, even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities.' Such a statute, we do not doubt, is beyond the power of state to enact. To hold otherwise would be to ignore one of the leading objects which the Constitution of the United States was designed to secure."

Same principle: *Brimmer vs. Rebman*, 138 U. S., 78 (as to diseased meat); *Crutcher vs. Kentucky*, (141 U. S., 47, 62).

Even if the mere certificates of stock sent or brought to New York for sale were to be deemed property within this State, this tax law is void under the commerce clause of the Federal Constitution.

(a) Void as to Interstate Commerce.

It is well settled by numerous decisions of this Court that if (as may be contended by the learned counsel for the State) the certificates themselves which Hatch brought into the State and sold are to be deemed property, then such sale is interstate commerce, and not subject to be taxed by the State of New York. A case directly in point is *Swift & Co. vs. United States*, 196 U. S., 375, in which this Court, Mr. Justice HOLMES giving the opinion, said (p. 398) :

" When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and *the purchase* of the cattle is a part and incident to such commerce. * * * It should be added that the cattle in the stock yard are not at rest even to the extent that was held sufficient to warrant taxation in *American Steel and Wire Co. vs. Speed*, 192 U, S., 500."

In this case, also, the case of *Hopkins vs. United States* is thus distinguished (p. 397) :

" So, again, the line is distinct between this case and *Hopkins vs. United States*, 171 U. S., 578. All that was decided there was that the local business of commission merchants was not commerce among the states, even if what the brokers were employed to sell was an object of such commerce. The brokers were not, like the defendants before us, themselves the buyers and sellers. They only furnished certain facilities for the sales."

In that case the sale was made under the laws of Illinois; the parties to that sale were present in Illinois, and the subject matter

of the sale was present in Illinois in the stockyards; and yet, because the sale was interstate commerce, this Court held that the Anti-trust Act of Congress of 1890 applied, a decision with which the opinion of the Court of Appeals in the present case is in direct conflict.

Another case directly in point is *McNeill vs. Southern Railway Co.*, 202 U. S., 543, in which the Court held that the transportation of cars of coal into the state of North Carolina and *the delivery of the cars there to the purchaser* of such coal was a part of interstate commerce, and not subject to regulation by the state of North Carolina by a railway commission appointed under the statutes of that state.

(b) Void Also as to Foreign Commerce.

If it be contended by the other side (contrary to the fact), that *certificates of stock* sent into New York for sale are property within the State, then under such a view this tax law would be clearly invalid as to this tax on sales of certificates of stock sent into New York from Great Britain or other foreign countries for sale in this State; because under the decision in *Brown vs. Maryland*, 12 Wheat., 419, no tax can be levied by a State on any import from a foreign country until after the thing imported is sold by the original importer. If this tax law is invalid as to sales of imported certificates, then inasmuch as the law is a unit and not separable, and the same clause of the law which levies a tax on sales of such imported certificates also levies a tax on sales of all other certificates, the entire law must fail.

It is true that it is not shown that the relator in this case was attempting to sell here certificates of stock in foreign corporations imported from a foreign country, but under the rule established by *Stuart vs. Palmer*, 74 N. Y., 183, the constitutionality of a law is to be tested by what may be done under it; and inasmuch as under this tax law the State not only *may*, but *must* levy a tax on all sales of imported certificates, and the law is not divisible or separable, the entire law is void. As this objection arises on the face of the act itself, it is open to this relator to avail himself of it. In other words, if in the case of the prosecution of an alien for not paying a tax on the sale of his stock in New York the act should be held un-

constitutional, equally it must be held unconstitutional in this case, although the relator is a citizen of Connecticut instead of a foreign country.

V.

On all of the several grounds above discussed we submit that the judgment below should be reversed.

John G. Milburn, ~~JOHN G. MILBURN~~,
John F. Dillon, ~~JOHN F. DILLON~~,
John G. Johnson, ~~JOHN G. JOHNSON~~,
Of Counsel for Plaintiff in Error.

APPENDIX.

CHAP. 241, LAWS OF 1905.

AN ACT

TO AMEND THE TAX LAW, BY PROVIDING FOR A TAX ON TRANSFERS OF STOCK.

The People of the State of New York, represented in Senate and Assembly, do enact as follows :

SECTION 1. Chapter nine hundred and eight of the laws of eighteen hundred and ninety-six, entitled, " An act in relation to taxation constituting chapter twenty-four of the general laws," is hereby amended by inserting therein a new article to be article fifteen and to read as follows :

Became a law April 19, 1905, with the approval of the Governor. Passed, three-fifths being present.

ARTICLE XV.

TAX ON TRANSFERS OF STOCK.

SECTION 315. Amount of tax.
316. Stamps how prepared and sold.
317. Penalty for failure to pay tax.
318. Canceling stamps ; penalty for failure.
319. Contracts for dies ; expenses how paid.
320. Illegal use of stamps ; penalty.
321. Power of state comptroller.
322. Civil penalty ; how recovered.
323. Effect of failure to pay tax.
324. Application of taxes.

SECTION 315. AMOUNT OF TAX.—There is hereby imposed and there shall immediately accrue and be collected a tax as herein provided, on all sales, or agreements to sell, or memoranda of sales or deliveries or transfers of shares or certificates of stock in any domestic or foreign association, company or corporation, made after the first day of June, nineteen hundred and five, whether made upon or shown by the books of the association,

company or corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale whether entitling the holder in any manner to the benefit of such stock, or to secure the future payment of money or the future transfer of any stock, on each hundred dollars of face value or fraction thereof, two cents. It is not intended by this act to impose a tax upon an agreement evidencing the deposit of stock certificates as collateral security for money loaned thereon which stock certificates are not actually sold, nor upon such stock certificates so deposited. The payment of such tax shall be denoted by an adhesive stamp or stamps affixed as follows: In case of sale where the evidence of transfer is shown only by the books of the company the stamp shall be placed upon such books; and where the change of ownership is by transfer certificate the stamp shall be placed upon the certificate; and in cases of an agreement to sell or where the transfer is by delivery of the certificate assigned in blank there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale to which the stamp provided for by this article shall be affixed; and every bill or memorandum of sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers, and no further tax is hereby imposed upon the delivery of the certificate of stock, or upon the actual issue of a new certificate when the original certificate of stock is accompanied by the duly stamped memorandum of sale.

§ 316. STAMPS HOW PREPARED AND SOLD.—Adhesive stamps for the purpose of paying the state tax provided for by this article shall be prepared by the state comptroller, in such form, and of such denominations and in such quantities as he may from time to time prescribe, and shall be sold by him to the person or persons desiring to purchase the same; he shall make provision for the sale of such stamps in such places and at such times as in his judgment he may deem necessary.

§ 317. PENALTY FOR FAILURE TO PAY TAX.—Any person or persons who shall make any sale, without paying the tax by this article imposed or who shall in pursuance of any sale, deliver any stock, or evidence of the sale of any stock or bill or memorandum thereof, without having the stamps provided for in this article affixed thereto, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned not more than six months, or by both such fine and imprisonment at the discretion of the court.

§ 318. CANCELLING STAMPS; PENALTY FOR FAILURE.—In every case where an adhesive stamp shall be used to denote the payment of the state tax provided by this article the person using or affixing the same shall write or stamp thereupon the initials of his name and the date upon which the same shall be attached or used, and shall

cut or perforate the stamp in a substantial manner, so that such stamp cannot be again used; and if any person fraudulently makes use of an adhesive stamp to denote the state tax imposed by this article, without so effectually cancelling and obliterating such stamp, such person shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than two hundred nor more than five hundred dollars or be imprisoned for not less than six months, or both, at the discretion of the Court.

§ 319. CONTRACTS FOR DIES; EXPENSES, HOW PAID.—The state comptroller is hereby directed to make, enter into and execute for and in behalf of the State such contract or contracts for dies, plates and printing necessary for the manufacture of the stamps provided for by this article, and provide such stationery and clerk hire, together with such books and blanks as in his discretion may be necessary for putting into operation the provisions of this article; he shall be the custodian of all stamps, dies, plates or other material or thing furnished by him and used in the manufacture of such state tax stamps, and all expenses incurred by him and under his direction in carrying out the provisions of this article shall be paid to him by the State treasurer from any moneys appropriated for such purpose.

§ 320. ILLEGAL USE OF STAMPS; PENALTY.—Any person who shall wilfully remove or cause to be removed, alter or cause to be altered the canceling or defacing marks of any adhesive stamp provided for by this article with intent to use the same, or to cause the use of the same after it shall have been once used, or shall knowingly or wilfully sell or buy any washed or restored stamp, or offer the same for sale, or give or expose the same to any person for use, or knowingly use the same or prepare the same with intent for the further use thereof; or shall wilfully use any counterfeit stamp or any forged stamp with intent to defraud the State of New York, shall be guilty of a misdemeanor, and on conviction thereof shall be liable to a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned for not more than six months, or by both such fine and imprisonment, at the discretion of the Court.

§ 321. POWER OF STATE COMPTROLLER.—The state comptroller may at any time after transfers of stock which by the provisions of this article are subject to a state stamp tax, inquire into and ascertain whether the tax imposed by the provisions of this article has been paid. For the purpose of ascertaining such fact the comptroller shall have the right and it shall be his duty to examine the books and papers of any person, firm, company, association or corporation. If from such examination the comptroller ascertains that the tax provided for in this article has not been paid he shall bring an action in any court of competent jurisdiction for the recovery of such tax and for any penalty incurred by any person under the provisions of this article.

§ 322. CIVIL PENALTY; HOW RECOVERED.—Any person who shall violate the provisions of this article shall in addition to the penal-

ties herein provided forfeit to the people of the state a civil penalty of five hundred dollars for each violation. The state comptroller shall bring an action in his name as such comptroller in any court of competent jurisdiction for the recovery of any civil penalty and all moneys collected by him shall be paid into the state treasury.

§ 323. EFFECT OF FAILURE TO PAY TAX.—No transfer of stock made after June first, nineteen hundred and five, on which a tax is imposed by this article, and which tax is not paid, at the time of such transfer, shall be made the basis of any action or legal proceedings, nor shall proof thereof be offered or received in evidence in any court in this state.

§ 324. APPLICATION OF TAXES.—The taxes imposed under this article and the revenues thereof shall be paid by the state comptroller into the state treasury and be applicable to the general fund, and to the payment of all claims and demands which are a lawful charge thereon.

§ 2. This act shall take effect immediately.

CHAPTER 414, LAWS OF 1906*.

An Act to amend sections three hundred and fifteen, three hundred and seventeen and three hundred and twenty one of article fifteen of the tax law in relation to the tax on transfers of stock.

Became a law May 11, 1906, with the approval of the Governor. Passed, three fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section three hundred and fifteen of article fifteen of the tax law, as enacted by chapter two hundred and forty one of the laws of nineteen hundred and five, is hereby amended to read as follows:

§ 315. AMOUNT OF TAX. There is hereby imposed and there shall immediately accrue and be collected a tax as herein provided, on all sales, or agreements to sell, or memoranda of sales, or deliveries, or transfers, of shares or certificates of stock, in any domestic or foreign association, company or corporation, made after the first day of June, nineteen hundred and five, whether made upon or shown by the books of the association, company or corporation, or by any assignment in blank, or by any delivery, or by any paper

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* The alterations in the 1905 Act created by this amending Act are in italics.

or agreement or memorandum or other evidence of transfer or sale whether entitling the holder in any manner to the benefit of such stock, or to secure the future payment of money or the future transfer of any stock, on each *share of one* hundred dollars of face value or fraction thereof, two cents. It is not intended by this act to impose a tax upon an agreement evidencing the deposit of stock certificates as collateral security for money loaned thereon which stock certificates are not actually sold, nor upon such stock certificates so deposited. The payment of such tax shall be denoted by an adhesive stamp or stamps affixed as follows: *In a case* where the evidence of transfer is shown only by the books of the company the stamp shall be placed upon such books; and where the change of ownership is by transfer *of a* certificate the stamp shall be placed upon the certificate; and in cases of an agreement to sell or where the transfer is by delivery of the certificate assigned in blank there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale to which the stamp provided for by this article shall be affixed; and every bill or memorandum of sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers, and no further tax is hereby imposed upon the delivery of the certificate of stock, or upon the actual issue of a new certificate when the original certificate of stock is accompanied by the duly stamped memorandum of sale. *The comptroller may, upon satisfactory proof that stamps have been erroneously affixed and canceled in payment of the tax upon a transfer and to the loss of an innocent person, refund the amount thereof from appropriations made for necessary expenses under this act, provided the tax justly due is paid upon such transfer.*

§ 2. Section three hundred and seventeen is hereby amended to read as follows.

§ 317. PENALTY FOR FAILURE TO PAY TAX. Any person or persons who shall make any sale *or transfer* without paying the tax by this article imposed or who shall in pursuance of any sale *or agreement* deliver any stock, or evidence of the sale of *or agreement to sell* any stock or bill or memorandum thereof, without having the stamps provided for in this article affixed thereto, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned not more than six months, or by both such fine and imprisonment at the discretion of the court.

§ 3. Section three hundred and twenty-one is hereby amended to read as follows:

§ 321. POWER OF STATE COMPTROLLER. *Every person, firm, company, association, or corporation, making a sale, agreement to sell, delivery, or transfer, of shares or certificates of stock shall keep a true record of such transaction and the date thereof.* The state comptroller may at any time after transfers of stock which by the pro-

visions of this article are subject to a state stamp tax inquire into and ascertain whether the tax imposed by the provisions of this article has been paid. For the purpose of ascertaining such fact the comptroller shall have the right and it shall be his duty to examine the books and papers of any person, firm, company, association or corporation, *and memoranda of transfers shall remain accessible for such inspection for three months from their respective dates.* If from such examination the comptroller ascertains that the tax provided for in this article has not been paid, he shall bring an action in any court of competent jurisdiction for the recovery of such tax and for any penalty incurred by any person under the provisions of this article.

§ 4. This act shall take effect immediately.

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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 310.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* ALBERT J. HATCH,

Plaintiff in Error,

against

EDWARD REARDON, A PEACE OFFICER OF THE COUNTY OF NEW YORK,

Defendant in Error.

In Error to the Supreme Court of the State of New York.

Brief of the Attorney-General of the State of New York, on Behalf of the People of the State of New York.

JULIUS M. MAYER,
Attorney-General of the State of New York.
HORACE McGUIRE,
Deputy Attorney-General.
JAMES C. GRAHAM,
Deputy Attorney-General.
Of Counsel.

Supreme Court of the United States,

PEOPLE OF THE STATE OF NEW YORK, EX REL., ALBERT J. HATCH, Plaintiff in Error, AGAINST EDWARD REARDON, A Peace Officer of the County of New York, Defendant in Error.	October Term, 1906. No. 310.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF OF THE ATTORNEY-GENERAL OF THE STATE OF NEW YORK, ON BEHALF OF THE PEOPLE OF THE STATE OF NEW YORK.

Statement.

The questions presented on this writ of error involve the constitutionality, under the Constitution of the United States, of Chapter 241 of the Laws of 1905 of the State of New York, entitled "An Act to Amend the Tax Law by providing for a tax on transfers of stock."

Counsel for plaintiff in error, in their brief, have stated, with substantial accuracy, the facts in the case,

and to insure brevity these facts need not here be repeated.

Plaintiff in error was arraigned before a Justice of the Court of Special Sessions in the City of New York, who has the powers of, and who acted in this case as a magistrate. Said plaintiff in error was charged with having committed a misdemeanor, in that he made a sale of certain shares of stock without affixing the stamps required by the act upon a bill or memorandum of such sale.

A writ of habeas corpus was sued out, which coming before the Special Term of the Supreme Court of the State of New York, was dismissed, and that determination was affirmed by the Appellate Division of the First Department of said Supreme Court, and again affirmed by the Court of Appeals of the State of New York. The majority and dissenting opinions in the Appellate Division of the Supreme Court (record, pp. 17 to 33) are reported in 110 App. Div. 821, and the opinion of the Court of Appeals (record, pp. 42 to 59), is reported in 184 N. Y. 431.

The act is attacked by the plaintiff in error upon three broad grounds stated by him in his brief, as

First. It denies to the relator and to all owners of shares of corporate stock the equal protection of the laws, contrary to the Fourteenth Amendment.

Second. It deprives him and all other owners of stock of property without due process of law.

Third. It imposes a tax upon commerce with foreign nations and among the several States, contrary to the provision of Section 8 of Article I.

In view of the fact that the statute in question is fully set forth in the brief of plaintiff in error, it need not be reprinted in this brief.

POINTS.

I.

The System of State Taxation in the State of New York.

At the very outset of the consideration of this statute, it is desirable to briefly describe the system of State taxation existent in the State of New York, so that the court may appreciate that this statute is simply an orderly development along the lines of that system.

At the present time, in the State of New York, there is no direct tax levied for State purposes. Many years ago the State entered upon a policy of indirect taxation. For a considerable period of time the State revenues were raised by both direct and indirect taxation. A direct tax was laid upon real and personal property, and by a system of equalization, the various localities or governmental subdivisions were required to pay into the State treasury their proportion of the State taxes. Other revenues were obtained from fees required upon the organization of domestic corporations, license fees from foreign corporations, and certain annual taxes upon corporations. Collateral inheritance taxes added to the State revenues, and later both collateral and direct inheritance taxes were the yield from decedents' estates; so that, at the present time, these taxes are known as transfer taxes, and aggregate a fair amount of revenue. This revenue from transfer taxes is necessarily fluctuating and dependent upon the amount of decedents' estates and the ability of the fiscal officers to discover the same.

In 1896, the Excise Law of the State of New York, dealing with the traffic in liquor, was changed, so far as here material, so that the tax upon the privilege of trafficking in liquor was divided between the State and

its governmental subdivisions in certain proportions, whereas, theretofore, the localities were the recipients of the whole tax.

Gradually the revenues from these sources increased so that, beginning with the administration of Governor Roosevelt, a policy was inaugurated whereby, in due course of time, direct taxes for State purposes should be completely abolished. This policy was further developed under the administration of Governor Odell.

On January 1, 1904, the present Governor of the State of New York, Hon. Frank W. Higgins, took office, and at that time the State tax had been abolished, except to the extent of a small compulsory tax provided for by the Constitution, for the purpose of paying the interest on the canal debt.

> Constitution of the State of New York, article VII, section 4.

At the commencement of the administration of Governor Higgins, it was apparent that the expenses of the State had gradually increased, so that a large sum of money was necessary to defray the obligations of government.

In addition to the usual expenses, common to all State governments, for the support of departments, the administration was confronted with the problem of providing revenues to meet the developing burdens of caring for the increasing insane population, of the increasing population of the feeble-minded, epileptic, and other dependents of the State, and of the increasing school population, a part of whose education is paid for by the State, in addition to the sums contributed by the localities of the State.

It may be remarked that, in the State of New York, the dependent insane population is cared for, and supported by, the State, and not by the localities, and

similarly, the State pays a substantial share toward the support of other unfortunates who may be generally classified as wards of the State. Many other expenses, not necessary to recite in detail, were to be met.

By the vote of the people, it had been determined that the State should construct, at an expense not to exceed $101,000,000, an enlarged barge canal, from the Great Lakes to the Hudson, to the end that the State should, at least, retain its commerce, and in the hope that, through this improved waterway, it might successfully compete with other States having within their borders important harbors and termini of travel and shipment.

Although the law providing for the building of the enlarged barge canal permitted the levy of a direct tax, it was the desire of the administration, in response to an established policy, to raise the moneys necessary for that purpose by indirect taxation and to continue the course of rendering direct taxation unnecessary.

The administration, thus confronted with these problems on January 1, 1905, realized that, in order to meet the expenses of government, a further source of indirect taxation was necessary. While the various corporation taxes, the excise tax, and the transfer tax, produced substantial revenues, yet these revenues were not sufficient to meet, by indirect taxation, the estimated expenses of government; and thus it was that the legislature, in its judgment, enacted the statute here under discussion, whereby a tax was to be laid upon the transfer of shares of stock.

This tax for the first year brought to the treasury of the State a sum, in round numbers, of $6,800,000. Having been enacted during the legislative session of 1905, it was followed by the vote of the people, authorizing an amendment of the Constitution of the State, whereby the legislature was invested with the power of abolishing the remaining item of direct taxation, to wit — the interest on the canal debt, above referred to.

The legislature of 1906, availing itself of the authority conferred upon it by the people, abolished this final remnant of direct taxation, and although the expenses of the State government for the latest fiscal year are $27,000,000, the result is that not a single dollar of this great sum is raised by direct taxation, but these large expenses of State government are entirely defrayed from the product of the indirect sources of taxation above referred to.

This result would not have been possible but for the enactment of the Stock Transfer Tax Law here under discussion and the revenues obtained thereunder.

Students of economics, taxation, and other governmental questions may honestly differ as to the proper methods of taxation, but it is elementary that the courts have no concern with the wisdom of an enactment. Their sole duty is to determine whether a statute is in accordance with constitutional requirements, and it is for the people, acting through the legislature, and the Executive, to decide as to manner and method of taxation.

Annexed to this brief is Appendix I. containing extracts from the messages of recent Governors, showing the policy of the State of New York in respect of the subject of State taxation.

From these messages, from legislative enactments, and from the ratification of this course by the people at the polls, it is clear that the settled policy of the State of New York is to raise its revenues for State purposes by indirect taxation, and that the enactment of the Stock Transfer Tax Law, now under consideration, was in pursuance of that policy, and was not a sudden or unexplained effort to bring within the taxing power a particular kind of business of transaction. On the contrary, the legislature sought merely to add another distinct class to those already selected.

Thus we come to the question whether the statute under discussion creates an unjust discrimination, offensive to the restrictions of the Federal Constitution.

II.

The Statute under Consideration does not Deny to the Plaintiff in Error and to All Owners of Shares of Corporate Stock the Equal Protection of the Laws, Contrary to the 14th Amendment of the Federal Constitution.

I.— The History, Theory, and Nature of the Taxation.

This great business is divided into two classes — investment and speculative. The investment class bears a proportion of about fifteen per cent. to the whole business transacted in the Exchanges: the balance of dealing in shares of stock is purely speculative, in which the operators, in and out of the Exchanges, deal for temporary rises and declines. The number of persons, engaged in stock operations, who are not members of the Exchanges is very large and they represent all classes of the community — merchants, salesmen, brokers, speculators, and many members of different professions. Without invidiously singling out the New York Stock Exchange or any Exchanges as a specific object of taxation, the legislature, by passing a general law applicable to every sale or agreement of sale of stock, as has been done in this case, seeks to raise a portion of its revenue from this source, by levying

" a tax on all sales or agreements to sell or memorandum of sales or deliveries or transfers of shares or certificates of stock in any domestic or foreign association,

company or corporation made after the first day of June, 1905, whether made upon or shown by the books of the association, company or corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum, or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, or to secure the future payment of money, or the future transfer of any stock, on each hundred dollars of face value or fraction thereof, two cents."

Within a century the whole basis of investment has changed, and individual or corporate wealth, which was, previously to the introduction of railroads and commercial corporations, represented by land and buildings, is now largely placed in shares of stock, and they constitute the bulk of the wealth of this country.

The advantages of this kind of investment are obvious. Certificates can be carried around by the owner without being subjected to the contingencies of loss from accident, fire, or theft. By a mere endorsement on the back of the certificate the owner is enabled to transfer it to a purchaser at once, and one certificate may be used as the basis of innumerable operations or transfers. These advantages have been availed of by men of moderate means as well as those possessing large wealth, and the shares in railroad corporations and commercial companies are now held by millions of small and large investors — and beside form the basis for enormous speculations.

Questions which inevitably arise by holding real estate, when the death of the owner occurs, and where dower rights and all kinds of other complications are involved, are all avoided by investments in shares. The corporations go on in the conduct and development of the business, while the ownership of the shares thereof changes a thousandfold; the new members of the cor-

poration going and coming without any effect upon the principal business. Thus all kinds of businesses have been put into corporations, and we now literally see the corner grocer doing business in corporate form, precisely the same in principle as the largest enterprise.

II.— Magnitude of dealings in stocks.

The dealings in these securities are so great that Exchanges, notably the New York Stock Exchange and the Consolidated Exchange, are used to facilitate their buying and selling. Besides, a large business is transacted on what is known as the "Curb," where dealings are had in stocks not listed upon the Exchange. The Evening Post (December 30, 1905) sums up the dealings in stocks as follows:

1905.	1904.	1903.	1902.	1901.
Shares				
262,680,084	186,592,712	160,731,627	158,520,000	186,930,942

In point of volume, the transactions in stocks are so fabulously large that any other kind of property, whether real or personal, when compared with them, in this respect, is of insignificant importance. There are special daily and weekly journals, and law and lay books, exclusively devoted to a discussion of this branch of business. Property in shares has gradually segregated itself from the body of other kinds of personal property, until, by a slow process of evolution, it has become marked, known, and treated as a separate and distinct class. The court will take judicial notice of the general course of dealing on the stock and other Exchanges in this class of property.*

* Nicol *vs.* Ames, 173 U. S., at pp. 516, 517; Treat *vs.* White, 181 U. S., at p. 268.

There could not be a fairer tax, one less burdensome, or one more uniform in its operations. The stocks covered by the tax represent almost every industry and every species of property — flour, cotton, oil, steel, and iron in all their various forms, and innumerable other products and industries, shares in land and in buildings, in mines and in waterworks, in banks and in railroads, and in brief, shares in everything representing investment. The tax does not touch the property; it simply requires a stamp upon each sale of stock.

III.— FEDERAL STAMP TAX AND DECISIONS SUSTAINING IT.

The United States Revenue Tax of 1898 provides as follows:

"SECTION 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected and paid * * * on all sales, or agreements to sell, or memoranda of sales or deliveries or transfers of shares or certificates of stock in any association, company or corporation, whether made upon or shown by the books of the association, company or corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale whether entitling the holder in any manner to the benefit of such stock, or to secure the future payment of money or for the future transfer of any stock, on each hundred dollars of face value or fraction thereof, two cents: provided, that in case of sale where the evidence of transfer is shown only by the books of the company the stamps shall be placed upon such books; and where the change of ownership is by transfer certificate the stamp shall be placed upon the certificate; and in cases of an agreement to sell or where the transfer is by delivery of the certificate assigned in blank there shall be made and delivered by the seller to the buyer a bill or mem-

orandum of such sale, to which the stamp shall be affixed; and every bill or memorandum of sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers. And any person or persons liable to pay the tax as herein provided, or any one who acts in the matter as agent or broker for such person or persons, who shall make any such sale, or who shall in pursuance of any such sale deliver any such stock, or evidence of the sale of any such stock or bill or memorandum thereof, as herein required, without having the proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor."

In the case of *United States* v. *Thomas*,* the defendant, a broker in the City of New York, sold certain shares of Atchison preferred stock and omitted the required revenue stamps from the memorandum of sale, with intent to evade the above tax. He was indicted and demurred to the indictment. The demurrer was overruled, and an opinion of great power and research was rendered by Judge Thomas, holding the Circuit Court in the Southern District of New York.

The defendant urged that the statute, so far as here involved, was unconstitutional, the ground being

"* * * that a certificate of stock is property; that a tax on the sale of property is a tax on the property itself; and * * * that the act provides for levying, without apportionment, a direct, and hence invalid, tax on such property."

The learned judge said:

"The present inquiry relates to a tax on a memorandum or contract of sale of a certificate of stock. What is such certificate? It is the evidence of the holder's

* January 28, 1902, 115 Fed. Rep. 207.

title to shares in the property and franchises of a corporation. The sale of the certificate is a transfer of such shares to another person. The State furnishes facilities whereby persons may form a corporation, which may designate the individual interests of its members by certificates, transferable upon its books, so as to permit the holders to manage or direct the business of the corporation, with such liability, privileges, and immunity as the charter and the law provide. Congress has declared that every person who holds such a certificate in such artificial body, and shall transfer by sale to another the right to participate in such corporation and to become a member thereof, with the accompanying property rights and benefits, shall pay a tax on the contract or transaction whereby the transmission is effected. It is not intended at this time to emphasize the benefits and protection afforded by the law to the members of such bodies, and the enhanced value of their property rights by reason of the facilities afforded them. In a matter of less importance such privilege would deserve, at least, consideration, but the present discussion will pursue broader views and inquiries."

* * * * * * * *

"The present question is whether a statute providing for a tax on contracts for the sale and delivery of certificates of stock lays a direct tax upon property, within the meaning of the constitution. It is a mere truism that a tax, whatever its form, falls primarily on the taxpayers' property, for how otherwise could it be paid? If a farmer actually pay a tax for the privilege of following his vocation, is not something exacted from his farm, stock, or other property? The same is the case if the tax be laid on the sale of the products of the farm. If a railroad company be taxed on bills of lading, the tax, when paid, is charged to operating expenses, and the result is precisely the same as if the tax were laid upon roadbed and equipment. Yet in no one of the three cases is the tax assessed on the property, nor is the property specifically subjected to the tax. The law commands that when the owner shall do an act,— for

instance, the act of selling property,— he, personally, in the first instance, shall pay a tax. So, if a tax, measured by the proceeds of sale, be laid on the privilege of selling articles in an exchange, the vendor, in case of sale, will have the precise amount of money at night as if the tax had been laid upon the sale of property, or upon the property itself. In short, the tax, however laid, when paid, burdens the taxpayer's property. But all this does not prove that the tax is direct. A system of taxation upon the sale of property is, in essential elements, different from a system that lays the tax directly upon property. The latter system is certain, because the tax is sure to arise and to be paid in any event. There is but a single condition requisite to the existence and payment of such tax, and that is the existence of the property. The statute is direct in its application, and, in theory, payment is inevitable, and to such payment principal and income alike are pledged. But a tax payable on the sale of property is contingent upon, and is laid upon, an event that may never arise, and the tax in the meantime is non-existent. For example, a statute providing for a direct tax on a parcel of land is, save as delayed by the acts of assessment and levy, instant in its operation; and the tax attaches as a lien upon the land, from which it may be dissociated only by payment. A statute directing a tax on contracts of sale of land is entirely executory, and may never be executed, and the estate continues in the hands of the owner, without burden or incumbrance. In the case at bar the affixing of the stamp awaits the sale, and even then the certificate passes without disability to the transferee. Hence no burden is laid on the certificate, nor does it ever become liable for the payment of the tax. The law simply says to the vendor: 'When you do an act, you shall pay a tax.' Moreover, a provision for a direct tax on land at once decreases its beneficial value, whether it be kept or sold, while a tax on an instrument of conveyance or transfer leaves the enjoyment intact. The present owner and his heirs forever may hold the property without diminution of profit. In the one case the State, in effect, seizes the land by the force of the statute, and there

is no latitude — no escape from the compulsory tribute. In the other nothing is taken away from the enjoyment of rights of ownership, save that, in the event of the owner engaging in the business transaction of selling or exchanging his property a tax must be paid thereon, taking the form of a stamp duty on indenture, or, if it be personal property, on a bill of sale or contract. It is simply a tax upon transactions in business activities, or forms of commercial dealings, and may be sustained on several grounds. In the first place, the statute may rest upon the power of congress to declare that any person who shall engage in the business (that is, occupation) of buying or selling certificates of stock shall pay a tax measured by the price realized. Is not such a statute lawful? The buying and selling of stocks, not by brokers alone, but by a large number of persons in every community who profess some other main vocation, is an occupation more or less constant. This has become a business — a vocation — and is amenable to federal taxation as such. These persons, maybe, could not be so well reached if the statute laid a gross duty in the form of a license tax on the individual trader in stocks. But in any case congress has the power to distribute such tax upon each item of business falling under the traffic. For it may lay a tax of $100 on the vocation of buying and selling stocks, it may lay a tax on the sale of stocks at the rate of 2 cents 'on each hundred dollars' sold. The principle that justifies an impost of $10 per annum on a baker supports the right to lay a tax of a fraction of a mill on the sale of each loaf of his bread. The principle that underlies the power, and not the peculiar form of its exercise, is regarded. Therefore it is not an answer that the instance charged may have been the only transaction of the dealer."

The learned Judge then proceeded as follows:

"In Knowlton v. Moore, 178 U. S. 41, 82, 20 Sup. Ct. 762, 44 L. Ed. 969, Mr. Justice White said:

"It is true that in the Income Tax Cases the theory of certain economists, by which direct and indirect taxes

are classified with reference to the ability to shift the same, was adverted to. But this disputable theory was not the basis of the conclusion of the court. The constitutional meaning of the word 'direct' was the matter decided. Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property; secondly, that the tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned. THESE CONCLUSIONS, HOWEVER, LEND NO SUPPORT TO THE CONTENTION THAT IT WAS DECIDED THAT DUTIES, IMPOSTS, AND EXCISES, WHICH ARE NOT THE ESSENTIAL EQUIVALENT OF A TAX ON PROPERTY GENERALLY, REAL OR PERSONAL, SOLELY BECAUSE OF ITS OWNERSHIP, MUST BE CONVERTED INTO DIRECT TAXES, BECAUSE IT IS CONCEIVED THAT IT WOULD BE DEMONSTRATED BY A CLOSE ANALYSIS THAT THEY COULD NOT BE SHIFTED FROM THE PERSON UPON WHOM THEY FIRST FALL."

After tracing the history of acts of Congress from the beginning of the Government, the learned Justice continues:

"* * * in Knowlton *v.* Moore, 178 U. S. 41, 59, 20 Sup. Ct. 755, 44 L. Ed. 969, Mr. Justice White met an objection to the power of the government to lay the taxes there involved by saying:

> 'Conveyances, mortgages, leases, pledges, and, indeed, all property, and the contracts which arise from its ownership, are subject, more or less, to state regulation, exclusive in its nature. If the proposition here contended for be sound, such property, or dealings in relation thereto, cannot

be taxed by congress, even in the form of a stamp duty. It cannot be doubted that the argument, when reduced to its essence, demonstrates its unsoundness, since it leads to the necessary conclusion that both the national and state governments are divested of those powers of taxation which from the foundation of the governments admittedly have belonged to them.'

* * * * * * * *

"It will now be inquired why a government that has power to lay an indirect tax upon a bond for the payment of money may not lay the same tax upon the sale; that is, the act of transferring, or (and) the contract for transferring, the bond from one holder to another. What is there so inherently different in the contracts as to enable a court to affirm the validity of the tax in one case, and to deny it in the other? Both are contracts. Both are founded upon the same presumable consideration. Both are business transactions involving a contractual relation. If A issue his promissory note to B for $1,000 upon receiving that sum from B, and B agree to sell it to C, and accordingly does deliver it to C for $1,000, upon what possible theory may the federal government place an unapportioned tax on the transaction between A and B and be denied the ability to place a like tax on the transaction between B and C? The only conceivable answer is that the premise is false, but this would deny the power of congress to lay the usual stamp tax on bills or notes. Passing to another assumption, if A, a corporation, issue shares of stock to B for $1,000 upon receipt of that sum, and B contract to sell them to C, and accordingly does deliver them to C for $1,000, upon what theory may the court affirm the power of the federal government to lay an unapportioned tax upon the transaction between A and B, and deny the power to lay a like tax upon the transaction between B and C? Is it because A is a corporation, and the tax is upon the corporate privilege? Does not the state give the privileges of the corporation to the stockholders, and, if the government may tax one privilege, may it not tax the other? Membership in a corporation created by the state is an

artificial privilege, similar, if not equal in degree, to that in an incorporated exchange, and the benefits of incorporation are the only advantages conferred by the state in the latter case; and to the opportunities afforded in both cases the national government is an entire stranger. Again, if the federal government may lay an unapportioned tax upon indentures whereby land is conveyed, why may not a like tax be placed upon contracts for sales of stock? One class relates to the sale of land, and the other to the sales of shares. There is no intrinsic difference. If the tax is on the certificate, so it is on the land. If one transfer is given the protection flowing from registration, so is the other. If the tax shifts in one case, in which case does it shift? One contract carries the land; the other muniments of titles to shares. It is difficult to understand why speculations or investments in stock should be exempted from, and exchanges or sales of real property exposed to, a stamp tax. It is illogical to affirm that an unapportioned tax upon one contract — for example, for the payment of money — is valid, and a tax upon a contract to sell property is invalid. Both tax an obligation, one to pay money for property received or to be received; one to exchange property for money. Thus, by looking at the inner nature of the transactions it is found that all have the essence of contracts, and that it is upon the contract, as embodying a business transaction, that the tax is laid. Whether upon the sale of stock the stamp is required to be placed upon the books of the company where the transfer is shown, on the transfer certificate or on a memorandum of sale, the tax is upon the business or act of making a legal contract; and the basis of the power is precisely the same as that which justifies a tax upon bills, notes or certificates of shares as originally issued, or contracts of conveyance. Congress may tax contracts in any form. It may tax contracts to buy certificates or contracts to sell the same. * * *

"As a basis of taxation, this power enures to congress quite as much as does the power to regulate the successions. The conception that the state may theoretically confiscate property at the death of the owner, but may only regulate its use and sale during his life, points to

a difference in degree of authority. The power of the state to regulate is a true and genuine dominion. It is constantly exercised. It furnishes some real basis for taxation.

"The defendant's contention, seemingly, is that, in procession of constitutional interpretation, some reason has just now appeared that should awaken the courts to a fundamental error, of which all men for a century have been profoundly unconscious. But such attention as is due the inquiry from the trial court confirms the wisdom of the past, and the power of congress to lay the tax. The demurrer should be overruled."

This case was affirmed,* the court saying:

"The sale of stocks is a particular business transaction in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property in the form of certificates. The stamp duty is contingent on the happening of the event of sale, and the element of absolute and unavoidable demand is lacking. As such, it falls, as stamp taxes ordinarily do, within the second class of the forms of taxation."

We respectfully submit that the above case is a direct precedent in this Court and the reasoning seems to us unanswerable.

The Congress of the United States is a body with limited powers: it possess none which are not to be found in the Constitution. The Legislature of New York, on the other hand, has absolute and unlimited powers, except where expressly restrained by the Constitution of the United States. None of the restrictions contained in the latter instrument cover this field of taxation.

* 192 U. S. 363, at page 369.

III.

The act is not "arbitrary and discriminating" in its character and operation, and does not violate "the fundamental principles of the taxing power," which we must assume is only a way of stating that it takes Appellant's property "without due process of law," against the Federal and State Constitutions; and denies to the holders of the stock of corporations "the equal protection of the laws," in violation of the fourteenth amendment to the Constitution of the United States.

I.—The above objections can be discussed as one proposition.

If the effect of a taxing statute is to take property without "due process of law," it is against both the Federal and State Constitutions. So a right to "the equal protection of the laws" as provided in the Fourteenth Amendment is only a further admonition on the part of the Federal to the State governments to treat, all alike, either as a whole, or as properly classified.

II.—General rules applicable to Federal and State taxation.

The power of Congress to tax is absolute, but the means by which it shall be exercised are laid down in the Constitution. On the other hand, the power of the State of New York may be said to be omnipotent, except when restrained by the Constitution of the United States. In the State Constitution there are no restraints upon its exercise. No provisions as to equality or uniformity. No specification as to direct or indirect taxation.

The regulation of the right of the general government to tax and of the restraints upon the States are fully set forth in THOMAS *vs.* UNITED STATES* as follows:

"By the first clause of section eight of article I. of the Constitution, Congress is empowered 'to lay and collect taxes, duties, imposts and excises,' '*but all duties, imposts, and excises shall be uniform throughout the United States.*"

This division of taxation into two classes is recognized throughout the Constitution.

By clause three of section two representatives and direct taxes *are required to be apportioned according to the enumeration prescribed,* and by clause four of section nine, *no capitation or other direct tax can be laid except according to that enumeration.*

By clause one of section nine the migration or importation of persons by the States was not to be prohibited prior to 1808, *but a tax or duty could be imposed on such importation not exceeding ten dollars for each person.*

By clause five it is provided: '*No tax or duty shall be laid on articles exported from any State.*'

By clause two of section ten, *no State* can, 'without the consent of the Congress, lay *any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws.*' By clause three the States are forbidden, without the consent of Congress, to '*lay any duty of tonnage.*"

"And these two classes, taxes so called, and 'duties, imposts and excises,' apparently embrace all forms of taxation, contemplated by the Constitution."

The restrictions of the Federal Constitution contained in the Fourteenth Amendment have already been referred to.

III. — IF UNITED STATES HAS POWER TO LEVY STAMP TAX, STATES HAVE LIKE POWER.

The importance of the case of *Thomas vs. United States* becomes paramount in this argument, because

* 192 U. S. 363.

it contains a forcible discussion of the nature of a law precisely the same as the one in question — in fact, from which the present statute was taken. It is the last utterance of this Court on the subject. It shows conclusively that it is a stamp tax, and, therefore, annihilates the arguments of our learned opponents in their efforts to show that this stamp tax is one on the "property" of corporations, and therefore void as taxing *property out of the jurisdiction of the State,* as taxing it without previous notice and opportunity to be heard, and as being an interference with interstate commerce and with foreign nations.

No answer has been made, or can be made, to the query, that if an act of Congress embracing almost the very language of this State law, be constitutional, why a State law should not be equally so? It is not answered by saying that the only question there involved was as to its being a "direct" tax — because, as there is no restriction of this kind in our State Constitution, no possible objection on that ground can be raised to the tax.

It is said by our opponents that the "act taxing sales * * * *is a taking of property without due process of law in violation of the Constitution* * * * of the United States."

Now, an act of Congress "taking property without due process of law" is just as obnoxious to the Constitution of the United States as a similar statute of a State would be. (Fifth Amendment.)

But *Thomas vs. United States* necessarily decides that such a statute is not contrary to the Constitution of the United States upon any ground. It holds that such a stamp tax is a legitimate exercise of National and State power; it wipes out all of the arguments about discrimination and illegal classification

which are set forth to overturn the present law; for if it be a "stamp or excise tax"— and not on "property"— how can it be said to tax property outside of the State? How can it be said to violate the Commerce clause of the Constitution? The adhesive stamp is placed upon certificates or agreements of sales, etc., *in this State.*

How do our learned opponents meet this Thomas case? They say it involved merely the question as to whether the tax was a "direct" one. This is an admission of the whole case, and, according to their own views, it leaves but one question: whether the excise tax violates the equality provision of the Fourteenth Amendment. They say an excise with respect to property beyond the jurisdiction of the State is just as much beyond the taxing power of the State as a direct tax on the same property." (*Ibid.*)

But the stamp is placed on *transactions in the State of New York.*

And we shall show, hereafter, that there is not a particle of ground, at least in this case, upon which to base such an argument.

It should be noticed in this connection that almost every class taxed under the Federal Revenue War Tax disputed the power of the Government constitutionally to levy the tax, but it was always sustained. Nicol *v.* Ames* was an instance where the facilities made use of and actually employed in the business of a board of trade were taxed. The *Thomas* case was another instance whether this power was attacked.

IV.— The tax is an excise or stamp tax.

It becomes, therefore, important to fully understand the scope and effect of this tax. Its technical, legal, nature has already been shown by the authority of the U. S. *v.* Thomas.† It is an excise or stamp tax.

* 173 U. S., p. 509.

† 115 Fed. Rep. 267; affd., 192 U. S. 363.

"Excise" is defined to be an inland imposition, sometimes upon the consumption of the commodity, and sometimes upon the retail sale, sometimes upon the manufacturer and sometimes upon the vendor.*

This definition is taken from the language of the Supreme Court of the United States.†

It is an essential and basic difference from a tax, in that a tax is, in our theories of taxation, required to be, as near as practicable, of uniform application or imposition.

"An excise, on the other hand, is of a different character. It is based on no rule of apportionment or equity whatever. It is a fixed, absolute and direct charge laid on merchandise, products or commodities, without any regard to the amount of property belonging to those on whom it may fall or any supposed relation between moneys expected to be paid and a special benefit occasioned to those by whom it is to be paid."‡

These definitions are fully confirmed by the English authorities. In the "Law of Stamp Duties," by Alpe, 9th ed., by Cane, p. 1, it is stated:

"The stamp law is *positivi juris*. It imports nothing of principle or of reason, but depends entirely upon the language of the Legislature (per Taunton, J., in Morley *vs.* Hill, 2 Dowl., 494). The Court will not adopt a strained construction of the law in order to avoid an incongruity or hardship; the error or mistake, if any there be, must be remedied by the Legislature (Lord Foley, in Comms. L. R., 3 Ex., 263)."

* 11 Am. & Eng. Enc. of Law, 2nd Ed., p. 579.

† *Pacific Insurance Co.* vs. *Soule* (7 Wallace, at p. 445), and was cited in the opinion of the Court in *Pollock* vs. *Farmers' Loan & Trust Co.*, 157 U. S., at p. 576.

‡ *Auer* vs. *Washington Mills*, 11 Allen (Mass.), 274.

It follows that the Stock Transfer Tax is not a property tax.

It may be conceded, for the purposes of the present discussion, that where a property tax is levied, there must be a grievance day. An opportunity must be afforded to the owner of the property sought to be taxed, to show to the assessing board the nature of the complaint, and to invoke a revision or other remedy. It is likewise true that where property is taxed, there must be an earnest effort by the taxing officers to assess values equally. Equal assessment is, of course, rarely possible, but the principle is as stated.*

But such is not the nature of this tax. The machinery for taxation consists of putting on the instrument — *an adhesive stamp.*

It will be noted that the statute does not tax the stock as such. The shares of stock may lie in vaults until the end of time, and as shares of stock, remain forever untaxed. The tax is, in principle, no different from the Federal Stamp Tax (hereinbefore particularly referred to), which was required upon agreements to sell, etc.

There the Federal Government did not assess the value of the stock certificates; it required a stamp upon the transfer.

So here, the State Legislature has not assessed the value of the stock certificate. Obviously, many certificates of stock have no market value — that is, they are not listed and dealt in on the Stock Exchange — and yet they are inherently valuable. Market value in stock is generally understood to be the value for which they are sold upon the floor of the Exchange; but there are many stocks which have no market value in that sense, and are only salable outside of the Exchange.

* *Coulter* vs. *Louisville & Nashville R. R. Co.*, 196 U. S. 599.

Then again, there are stocks of corporations which are held under agreements or arrangements so that the stock must first be offered to a co-stockholder, before it can be sold. Such stocks have no market value in the sense in which active stocks have a market value.

So a stamp on a check under the Federal law was the same, whether it was for one cent, or one million of dollars. And the same remark applies to a promissory note, which was taxed whether it was signed by a millionaire or a pauper.

These facts vividly illustrate the nature of a stamp duty or excise tax and clearly distinguish it from a property tax.

It readily can be seen, that there would be no means of ascertaining the value of thousands of shares of corporate stock, which daily change hands in the City and State of New York. It must be assumed that the Legislature saw these practical difficulties, and realized that it would be a physical impossibility to levy a tax based upon the value of corporate shares. The Legislature also realized that stock transactions run up to large figures every day, and that any effort to base a tax upon values might seriously impair the orderly and quick dealings, which are so necessary in our Exchanges. We can readily see that if this had been a tax upon property, constant disputes would arise between the buyer and the seller; that these disputes would be the subject-matter of controversy before the New York State Comptroller or some other fiscal officers, and subsequently in the Courts. Thus, instead of a simple method of taxation operating automatically, the transactions on Stock Exchanges would have been so hampered and interrupted that it would have cost its members millions of dollars.

Besides, the Legislature, when it is enacting a Tax

Law, has the right to consider the ability of enforcement and the efficiency of safeguards against evasion. And to that end it may very properly adopt a simple method difficult of evasion.

Without pursuing the subject further, it is apparent that it was never the legislative intent to tax shares of stock as property, but it was simply copying the example of the Federal Government in *taxing transfers*, and following its own legislation in the inheritance tax (now called Transfer Tax), statutes.

IV.

The Act neither creates discrimination nor produces confiscation of property, under the Constitution of the United States.

1.— RULE AS TO DISCRIMINATING OR CONFISCATORY LEGISLATION.

For the purposes of this argument it may be assumed that a tax, which is clear and hostile in its discrimination against particular persons and classes, and of an unusual character unknown to the practice of government, and amounting to practical confiscation, may be obnoxious to the provisions forbidding property to be taken "without due process of law," and to the 14th Amendment. This doctrine is announced in HENDERSON BRIDGE COMPANY *vs.* HENDERSON CITY as follows:*

"In order to bring taxation imposed by a State within the scope of the fourteenth amendment of the National Constitution, *the case should be so clearly and palpably* an illegal encroachment upon private rights as to leave no doubt that such taxation, by its *necessary* operation, *is really spoliation under the guise of exerting the power* to tax."

* 173 U. S., p. 592.

The leading question, therefore — basing the discussion upon the premises laid down as above — is: *whether the act discriminates against one taxpayer in favor of others, and is so indiscriminate and unequal in its effects as, practically, to amount to confiscation?*

II.— The grounds for the tax stated.

It seems to us that the question must be negatively answered for the following reasons:

(*a*) Dealings in stock constitute a fair and proper subject for taxation. They are the bulk of National and State wealth.

(*b*) The classification of such dealings is natural and orderly, and not strained, arbitrary, or artificial.

(*c*) It does not unjustly discriminate: it deals with the subject as a whole.

(*d*) It is uniform.

(*e*) It is equable.

(*f*) It is based upon the most conservative maxims of taxation: tax that which can best stand it.

(*g*) In its choice of subjects for taxation, the classification of the Legislature, under these circumstances, is controlling.

III.— The above grounds are severally supported by, among others, the following considerations and precedents.

The suggestion that the legislature selected stocks from the mass of property in the State, to invidiously and discriminatingly tax them, to the point of confiscation, we submit, is wholly unwarranted by contemporaneous history. This class of property had long ago segregated itself from other properties and stood out in bold relief in the commercial world. The necessities of the State required it to levy a small stamp tax upon

dealings in them. There was no artificial classification created for the mere purpose of taxation. The imagination of the legislators was not stretched to devise and create a new species of property. It already existed as distinct and clean-cut from other personal property, as a horse from a cow. The Court said in Nicol *vs.* Ames:*

"Nor is there any doubt that these exchanges facilitate transactions of purchase and sale, and it would seem that such facilities or privileges, even though not granted by the government or by a State, might nevertheless be recognized as existing facts, and to be subject to the judgment as fit matters for taxation."

If the "facilities" can be taxed, why may not a "stamp duty on transactions be levied?"

In the Matter of Whiting† this very question is answered:

"The main use of certificates is for convenience of transfer, and they are treated by business men as property for all practical purposes. They are sold in the market, transferred as collateral security to loans, and are used in various ways as property. They pass by delivery from hand to hand, are the subject of larceny, *and are taxable generally when in possession of an agent in this State.* They are the only evidence of transfer required by the corporation issuing them in order to make the actual transfer on the books. *There is obvious propriety in subjecting the instrument of transfer to a transfer tax when it is left in this State for safe keeping.* It is subject to the jurisdiction of our laws, and hence is within the intent of the Transfer Tax Act. *When the design of the Legislature is to tax the transfer of everything that it has power to tax, there is no inconsistency in taxing in one form if another is not available.* Indeed, perfect consistency is not always practicable in a scheme of taxation that is intended to let nothing escape that can be owned or

* 173 U. S., at p. 518.

† 150 N. Y., at p. 30.

transferred. Thus the Legislature intended, as I think, to repeal the maxim *mobilia personam sequuntur*, so far as it was an obstacle, and to leave it unchanged, so far as it was an aid, to the imposition of a transfer tax upon all property in any respect subject to the laws of this State. I think this intention plainly appears from the history of legislation upon this subject, the decisions of the courts, some of them in effect repealed, and from the sweeping language of the statute, which subjects everything that can be owned in this State to a succession tax, except so far as expressly excepted. The Legislature possessed and exercised the power to employ the maxim when necessary, and to disregard it when necessary to attain that object. That dominant purpose is the key to the construction of the act, and it should not be thwarted by the conservatism of the courts, even if, in order to embrace all kinds of property, it is necessary to make it so pliable in application as to conform to all methods of doing business and all ways of holding property."

As was said by the Supreme Court of the United States:*

"The courts are not authorized to substitute their views for those of the legislature. We can only consider the legislation that has been had, and determine whether or not its *necessary* operation results in an unjust discrimination *between the parties charged* with its burden."

The argument that the Legislature must tax *all* personal property as a means to reach stocks is contrary to the whole theory of law, upon the power of the State to levy taxes. Such a rule would give the Legislature no discretionary power whatever, to discriminate in its taxation. There may be very important reasons, which would require the exclusion of other kinds of property

* Travelers Insurance Company *vs.* Connecticut (185 U. S., at p. 371).

from a stamp tax, such as is placed on stock transactions. The Legislature

" may impose all the taxes upon lands, or all upon personal property or all upon houses or upon incomes. It may raise revenue by capitation taxes, by special taxes upon carriages, horses, servants, dogs, franchises and upon every species of poperty and upon all kinds of business and trades." *

The power of the Legislature has been explicitly expressed in three well-known cases — two in the Supreme Court of the United States, and the other in the Court of Appeals in New York.†

Quoting from the first case the Court said:

" It may, if it chooses, exempt certain classes of property from any taxes at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature, or the people of the State framing their constitution."

"And in the New York Court of Appeals‡ the Court held that " In performing the duty of levying taxes the legislature may, in its discretion, impose unequal or double taxes, and in determining the question of [illegible] islative power the Courts are precluded from considering that question."

* Matter of McPherson, 104 N. Y., at p. 316.

† *Magoun* vs. *Illinois Trust & Savings Bank* (170 U. S. 293), citing with approval various well known cases, especially *Bell's Gap Railroad* vs. *Pennsylvania* (134 U. S. 232); *Blackstone* vs. *Miller* (188 U. S. 189).

‡ *People* vs. *The Home Insurance Company* (92 New York, p. 337.

At page 344, we find this significant language:

"The contention is that we should hold that the legislature has really imposed a tax upon property while professing only to tax a franchise. In other words, the rule of construction claimed is, that we should impute to the legislature an unlawful intent in a case where its action is plainly sustainable upon justifiable grounds. Well and long settled rules forbid us from placing such an interpretation upon statutory enactments, and require us to make every reasonable intendment to uphold rather than to nullify the exercise of legislative authority. The authorities cited would seem to require us to hold this law valid as a tax upon franchise, even though that character had not been expressly ascribed to it by the terms of the act."

Our learned opponents ask in substance:

"But what difference is there between *bonds* of a corporation which represent the portion of its capital which it has raised by their sale, as property, and *its shares*, which represent the portion of its capital raised by their sale? What difference is there between *shares* which are bought and sold in the market, as property, and other allied species of personal property which are bought and sold in the same way?"

The difference between bonds and stock, commercially, legally, and practically, is the difference between night and day. A bondholder is a creditor of the corporation; his bonds are generally secured by mortgage upon the property of the corporation. The shareholder is the owner of a proportionate part of the capital stock. He is not a creditor, and has no present right to the property, or to dividends. His ownership is evidenced by a certificate. The property, capital stock, assets, of the corporation, may exist in one place, and the stock certificate in another.

The great mass of bonds are held for investment. The great mass of shares of stock is constantly chang-

ing hands. In many particulars a bondholder stands in different legal relations toward corporate property from a stockholder.

The difference between bonds and stock is so marked that each represents a different kind of interest in corporate property, and each may properly be regarded as in a separate class for the purpose of the sovereign exercise of the taxing power.

They are two separate taxable entities.

But the question which our opponents propound was answered by the Supreme Court of the United States.*

"Another objection taken is that Congress taxes only those *who make sales* and *not those who make purchases*, and *those who sell products or merchandise* and *not those who sell bonds, stocks, &c.* These are discriminations, it is said, which do not follow the rule of uniformity, and hence render the tax void."

The Court promptly overruled the objection.

In Machine Co. *vs.* Gage† the Supreme Court of Tennessee decided that the law of that State imposing an annual tax upon

"all pedlers of sewing machines and selling by sample"

levies such

"tax upon all pedlers of sewing machines, without regard to the place of growth or produce of material or of manufacture."

Held that the law, so construed, is not in violation of the Constitution of the United States.

"In the case before us, the statute in question, as construed by the Supreme Court of the State, makes no such discrimination. It applies alike to sewing ma-

* Nicol *vs.* Ames (173 U. S., at p. 522).
† 100 U. S., p. 676.

chines manufactured in the State and out of it. The exaction is not an unusual or unreasonable one. The State, putting all such machines upon the same footing with respect to the tax complained of, had an unquestionable right to impose the burden."*

And in another case the doctrine was laid down in these words:

"The right to equal protection of the laws is not denied by a state court when it is apparent that the same law, or course of procedure, would be applied to any other person in the state under similar circumstances and conditions."†

In *Cook vs. Marshall County*‡ it was held that a classification in a taxation statute in which distinction is made between retail and wholesale dealers, is not unreasonable, and that Section 5007 of the Iowa Code, imposing a tax on cigarette dealers, is not invalid as denying equal protection of the law to retail dealers, because it does not apply to jobbers and wholesalers doing interstate business with customers outside of the State.

V.

The law does not violate the Commerce Clause of the Constitution either between the States or as to Foreign Nations.

I.—Scope of the Commerce Clause.

A vendor and a vendee voluntarily come to the City of New York, the former bringing with him a certificate of stock. He sells this certificate in New York City and receives the purchase money there. The Legislature having levied a stamp duty on this transfer

* *Ibid*, p. 679.
† Tinsley vs. Anderson, 171 U. S., page 101.
‡ 196 U. S. 261.

of title to the certificate, it is asserted that the law is in violation of the Commerce Clause of the Constitution, because the vendor and vendee are non-residents, and because the certificate of stock represents an interest in a foreign corporation.

"Congress shall have power * * * to regulate Commerce *with* foreign nations and *among* the several States." In all of the attempts to avoid taxation nothing goes quite as far as this contention: Every element which would justify the application of this clause to State taxation is absent in this case.

Two residents and citizens of Italy bring bananas or oil into the City of New York and enter into a contract for their sale and consummate it there by delivering the merchandise and receiving the consideration there. Can the Legislature levy a stamp tax upon this agreement of sale?

Two residents and citizens of Ohio bring wheat to New York City and enter into and consummate a sale thereof at the latter place. Can the Legislature levy a stamp tax upon the transaction?

We submit that certificates of stock cannot be the objects of commerce within the meaning of this clause, under the circumstances disclosed in this case — or perhaps in any case.

II.— PRACTICAL OPERATION OF THE ACT IN QUESTION.

The *subject-matter* of the tax is a stamp:

(1) On all sales; (2) agreements to sell; (3) memorandums of sales; (4) or deliveries or transfers of shares or certificates of stock in any domestic or foreign corporation.

The law covers sales, &c., made *in the State of New York.* It does not, in words or spirit, embrace transactions in stocks outside of New York State. It does

not aim to have any extra-territorial effect. It applies solely to dealings in stocks in this State. It covers a *business* of stock dealing here. It does not directly or indirectly touch or affect any property outside of the State.

As a matter of fact, all deliveries of stock sold on the Stock Exchanges are made in New York City. The certificates are necessarily there when the sales are made. Under the course of dealings on the Stock Exchanges, of which the Courts will take notice, deliveries must be made the day after the sale. The point, then, is clear that the legislature was dealing with a business which was entered into and fully consummated in New York.

The difference between a stamp tax on *transfers* and one on *property* is well described in UNITED STATES *vs.* THOMAS,* where the Court said:

†A system of taxation upon the *sale of property* is, in essential elements, different from a system that lays the tax directly *upon property*. The latter system is certain, because the tax is sure to arise and to be paid in any event. There is but a single condition requisite to the existence and payment of such tax, and that is the existence of the property. The statute is direct in its application, and, in theory, payment is inevitable, and to such payment principal and income alike are pledged. But a tax payable *on the sale of property is contingent upon, and is laid upon, an event that may never arise, and the tax in the meantime is non-existent.*"

Some comfort is sought to be obtained by our learned opponents from an isolated expression of the Court in Nicol *vs.* Ames,‡

"A tax upon the privilege of selling property at the Exchange and of thus using the facilities there afforded in accomplishing the sale differ radically from a tax

* *Ibid*, p. 679.

† Tinsley *vs.* Anderson, 171 U. S., page 101.

‡ 173 U. S., p. 521.

on every sale made in any place. The latter tax is really and practically upon property."

We have shown from the preceding extract from Judge Thomas' opinion the difference between a tax upon a sale and a tax upon property. That opinion was *directly sustained* by the Supreme Court, long after Nicol *vs.* Ames was decided.* This expression must be read with the rest of the decision.

It is a *dictum* of the learned Judge which we believe meant merely to distinguish between a tax upon the privilege of selling property and a tax upon the property which was the subject-matter of a sale. It did not refer to a tax upon the transfer of a share of stock.

Let us consult the case of Nicol *vs.* Ames to see what tax the Court sustained in that case.

The character of those cases — because there were three of them — is stated in the opinion of the Court by Mr. Justice Peckham:†

"The cases embrace the facts of a member of the Board of Trade of Chicago, *selling for immediate delivery, products or merchandize:* (*a*) without making a memorandum; (*b*) making a memorandum, but omitting to put stamps on it;‡ (*c*) making a sale for future delivery and failing to put stamps on the memorandum."

The United States tax, under which these cases arose, was as follows:

"Upon each sale, agreement of sale or agreement to sell any products or merchandise at any exchange or board of trade, or other similar place, either for present or future delivery, for each one hundred dollars in value of said sale or agreement of sale or agreement to sell, one cent, and for each additional one hundred dollars or fractional part thereof in excess of one hundred dollars, one cent; Provided, that on every

* 192 U. S., 363.

† 173 U. S., at p. 513.

‡ The offenses charged against defendant in this case.

sale or agreement of sale or agreement to sell as aforesaid, there shall be made and delivered by the seller to the buyer a bill, memorandum, agreement or other evidence of such sale, agreement of sale or agreement to sell, to which there shall be affixed the lawful stamp or stamps in value, equal to the amount of the tax on such sale."

The objections to the validity of the act were "that it is a direct tax and is illegal because not apportioned as required by the Constitution."

It will be noticed that the stamp tax was predicated *upon the value*

"for each one hundred dollars in value of said sale or agreement of sale or agreement to sell, one cent, and for each additional one hundred dollars or fractional part thereof in excess of one hundred dollars, one cent."

The Court wiped out as inapplicable all of the cases cited by our learned opponents, to sustain their contention, that the present tax is one upon property in the following language:*

"It is asserted to be a direct tax because it is a tax upon the sale of property *measured by the value of the thing sold,* and such a tax is a direct tax upon the property itself, and therefore subject to the rule of apportionment. *Various cases are cited, from Brown vs. Maryland,* 12 *Wheat.* 419, *down to those involving the validity of the income tax,* 157 *U. S.* 429; 158 *U. S.* 601, for the purpose of proving the correctness of this proposition."

The Court held that they did not apply, and upheld the law.

Continuing the analysis, we find that the *vendor and the vendee* are also necessarily present in New York either in person or by authorized agent, when the sale or agreement to sell is made.

* 173 U. S., at p. 518.

In respect of the right of the State to tax, it may be well to recur to the decisions of the Supreme Court of the United States in those cases where the power of the State has been challenged, to discover its real scope. In the PASSENGER CASES,* Mr. Justice Taney laid down this rule:

"I may therefore safely assume that according to the true construction of the Constitution the power granted to Congress to regulate commerce did not in any degree abridge the power of taxation in the States ....They are expressly prohibited from laying any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws, and also from laying any tonnage duties. So far their taxing power over commerce is restrained, but no further."

The rule is also laid down in the case of State tax on Foreign-held bonds,† where the Court said:

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects *are persons, property, and business.* Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though, as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural conditions, in its manufactured form, and *in its various transmutations.* And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, *the power of the State as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction.*"

* 7 Howard, 283, 480.

† 15 Wallace, 300, 319.

Although the result reached in the above case has been questioned, if not overruled by two cases,* the rule above stated is sufficiently broad for the purposes of the case at bar.

When the State may tax at all, the manner in which the tax shall be assessed, and the rate of taxation, however arbitrary or capricious, are matters of legislative discretion. It is not for the Federal Court to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed. The only concern of that court is with the validity of the tax; all else is beyond its jurisdiction.†

Recurring to the analysis which we have already made of the Act, it appears that every element exists, which under *all* of the cases, is necessary to justify State taxation. The jurisdiction of the legislature as to the *situs* is complete. The *persons, property* and *business"* are all here — within the State. Not one, but all of the elements to confer jurisdiction are found. The certificates of stock are in the State, the vendor and vendee are in the State; the contract is executed in the State, the business is in the State.

III.— Right of the State to tax all property within her jurisdiction.

But, say our opponents, the "Certificates of Stock" are only evidence of the ownership of the shares, and the interest represented by the shares is held by the Company for the benefit of the true owner. * * * it follows that sales of shares of stock *in a foreign cor-*

* Savings Soc'y vs. Multnomah County, 169 U. S., 421; and New Orleans vs. Stempel, 175 U. S., 309.

† Delaware Railroad Tax, 18 Wall., 206, 231; Steamship Co. vs. Pennsylvania, 122 U. S., 326–336; Vermont & Canada R. R. Co. vs. Vermont Central R. R. Co., 63 Vt., 119.

poration is a sale of an interest * * * and if that *property* is not within the State it is not taxable here UNLESS, AT ANY RATE, THIS STATE IS THE DOMICILE OF THE OWNER.

But, this is not a correct statement of the law, either as laid down by the Supreme Court of the United States or by the Court of Appeals of the State of New York. The *certificate of stock, if in the State,* is liable to taxation — to attachment and execution. It is tangible property, having an existence absolutely complete and separate from the capital stock of the company — its assets, its property. The distinction between a tax upon the "Corporation" and "the shares of stock, or, in other words, the certificates held and owned by individuals," is strongly drawn in People *ex rel.* Commercial Cable Co. *vs.* Morgan.*

The Supreme Court of the United States has had much to do with this question, and we beg to quote some of its decisions upon the point.

In People *vs.* The Commissioners† the language of Van Allen *vs.* Assessors‡ is quoted and approved:

"'But, in addition to this view, *the tax on the shares is not a tax on the capital of the bank.* The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. * * * The interest of the shareholder entitles him to participate in the net profits earned by the bank in the

* 178 N. Y., at p. 439.
See also People *vs.* Kelsey, 105 App. Div. 175; affd. without opinion by the Court of Appeals.
† 4 Wallace, at p. 258.
‡ 3 Wallace, 573.

employment of its capital during the existence of its charter in proportion to the number of his shares and upon its dissolution or termination, to his proportion of the property that may remain, of the corporation, after the payment of its debts. *This is a distinct, independent interest or property held by the shareholder like any other property* that may belong to him"; and, we add, *of course is subject to like taxation.*

This language is approved in Cleveland Trust Company *vs.* Lander,* where the distinction between the property of a corporation represented by its capital stock, and the property of the shareholders represented by the shares, was distinctly enforced, and the separate individuality of each recognized as forming two complete sources of taxation, when necessary.

This view is also most vividly and forcibly illustrated by our Court of Appeals.† The Simpson case is important in many respects, because it very clearly distinguishes the cases cited on our opponent's brief.‡ In the case of Simpson, the Appellate Division of the Supreme Court, in the First Department, certified the following question of law to the Court of Appeals:

"Whether where the certificates of stock of a foreign corporation belonging to a non-resident of the State *are in possession of a resident of this State as pledgee, the interest of the owner and pledgor can be levied upon under a warrant of attachment* against such owner made by service of a notice on the pledgee in the manner prescribed by subdivision 3 of section 649 of the Code."

The Court held that it could. The argument against the right to levy the attachment was based upon pre-

* 184 United States, at page 114.

† Simpson *vs.* The Jersey City Contracting Company (165 New York, p. 193).

‡ Plimpton *vs.* Bigelow, 93 New York, 592, and the Bronson Case, 150 New York, page 1.

cisely the same ground as is now made by our opponents.

"It is insisted that 'the stock of a foreign corporation is not properly within the State subject to levy of attachment against a non-resident owner.' Thus generally stated, and within such a state of facts as is shown in the case cited of Plimpton *v.* Bigelow (93 N. Y. 592), the propositions may be true. In that case the plaintiffs were non-residents of the state, but they brought an action therein against the defendant, who was also a non-resident. It was attempted to attach shares of stock of a foreign corporation which were owned by the defendant, and *the certificates of which were in his possession at his domicile,* by causing the sheriff to make a levy upon an officer of the corporation in the City of New York, under the provisions of section 649 of the Code. It was held that the section did not apply, for the reason that the fundamental condition of an attachment proceeding did not exist, namely, that the *res* must be within the jurisdiction of the Court for an effectual seizure * * * That case differs materially, but it was pointed out in the opinion that intangible rights, or interests, or *choses in action,* are made by the statute susceptible of seizure by attachment, when they can be said to be constructively present within the jurisdiction." * * *

* * * "It is true that the corporate property represented by the shares of stock was not within this jurisdiction; but how is that a controlling consideration, and can it reasonably be said that this defendant had no property here, whether we regard it as in the transferred certificates of stock, or as in the claim or demand which it had against the trust company? What is the reasonable view, and, therefore, the one which the law should take? *Jurisdiction, certainly, is founded upon the presence of the thing in respect to which it is exercised.* The action is *in rem* and the question seeks the place *rei sitæ.* That the defendant had conditionally parted with his interest in the stock to the trust company is true. That it had transferred to it the possession of the certificates evidencing that

interest — its muniments of title — with the right to transfer the same, upon a sale in satisfaction of the debt secured, is true. * * * Did it not, therefore, clearly, have property rights, or interest, within this State, which could be impounded by our courts, to abide the result of the litigation over the plaintiff's claim? I think so. The distinctions sought to be drawn are, largely, artificial. * * * CERTIFICATES OF STOCK ARE TREATED BY BUSINESS MEN AS PROPERTY FOR ALL PRACTICAL PURPOSES. THEY ARE SOLD IN THE MARKET AND THEY ARE TRANSFERRED AS COLLATERAL SECURITY FOR LOANS, AND THEY ARE USED IN VARIOUS WAYS AS PROPERTY. THEY PASS BY DELIVERY FROM HAND TO HAND AND THEY ARE THE SUBJECT OF LARCENY." (See *In re* Whiting, 150 N. Y. 27.)

The same doctrine is laid down in the Supreme Court of the United States.*

However, there can be no dispute in respect to the facts in the present case. They are set forth in the petition and writ of habeas corpus, which show that the vendor and the vendee were both in the City of New York, that the certificate of stock was here, *that the sale was made in the City and State of New York* and *that the whole business transaction was consummated in the Borough of Manhattan, County and State of New York.*

The petition† is as follows:

"On the 8th day of June, 1905, your petitioner was arrested * * * on the charge of *having sold in the Borough of Manhattan, City, County and State of New York, to Charles W. Maury, on the 7th day of June, 1905*, one hundred shares of the common capital stock of the Southern Railway Company, a corporation organized under and by virtue of the laws of the State of

* Orleans *vs.* Stempel, 175 U. S., p. 319. Savings Bank *vs.* Multnomah Co., 169 U. S., 421.

† Pages 2 and 3 of the Papers on Appeal.

Virginia, and owning and operating a system of railroad situated wholly without the State of New York, of the par value of $100 per share for the sum of $30.75 per share in cash, that being the then market value of said shares; and one hundred shares of the common capital stock of the Chicago, Milwaukee & St. Paul Railroad Company, a corporation organized under and by virtue of the laws of the State of Wisconsin and owning and operating a system of railroads situated wholly without the State of New York. ....., *and of having on said 7th day of June, 1905, in the Borough of Manhattan aforesaid, in pursuance of such sale, and on the payment of the sum of $20,275, the total purchase price of such shares by said Charles W. Maury to him, delivered to said Charles W. Maury, such shares issued by said companies respectively, assigned in blank,* without making and delivering to said Charles W. Maury any bill or memorandum," etc.

Maury's affidavit is to the same effect, that Hatch, who resides in Stamford, Conn., sold to deponent, in the Borough of Manhattan, these stocks,

"And that on said 7th day of June, 1905, in the Borough of Manhattan aforesaid, the said Albert J. Hatch, in pursuance of such sale, and on the payment by me to him of the sum of $20,275, the total purchase price of such shares, delivered to deponent two certificates of stock representing such shares issued by such companies respectively, assigned in blank."

An equal tax on property which has acquired a situs within the State does not, in any proper sense, interfere with the transactions of commerce. A large part of the commodities which are sold in every community are brought from other States, and many of these commodities are in competition with goods produced within the State. To hold that a tax could be laid only on domestic articles would give foreign goods an exemption from burdens which are necessarily borne by all other property within the State, and would drive the

domestic goods from the market. The general course of decisions has supported this view and has sustained taxation of goods brought from other States, if taxed like all other property in the State.*

A State may tax all property which has a *situs* within its limits, regardless of the fact that it may have come from or is destined to foreign countries or another State.† Certainly then it can tax a transaction — to wit, a transfer taking place within the borders of the State.

In approving the case of Woodruff *vs.* Parham,‡ and other cases, the Supreme Court of the United States, in 1903,§ said:

"The several States, therefore, not being controlled as to such merchandise by the prohibition against the taxation of imports, it was held that the States had power, after the goods had reached their destination and were held for sale, to tax them, without discrimination, like other property situated within the State.

"Those two cases, decided, the one more than thirty-five and the other more than eighteen years ago, are decisive of every contention urged on this record depending on the import and the commerce clause of the Constitution of the United States. The doctrine which the two cases announced has never since been questioned. It has become the basis of taxing power exerted for years by all the States of the Union. The cases themselves have been approvingly referred to in decisions in this court too numerous to be cited."

* Pittsburgh, etc., Coal Co. *vs.* Bates, 156 U. S., 577; 40 La. Ann., 226.
Brown *vs.* Houston, 114 U. S., 622.
Woodruff *vs.* Parham, 8 Wall., 123.

† Coe *vs.* Errol, 116 U. S., 517.
Brown *vs.* Houston, 114 U. S., 622.
Standard Oil *vs.* Combs, 96 Ind., 179.
Rieman *vs.* Shepard, 27 Ind., 288.
Carrier *vs.* Gordon, 21 Ohio St., 605.

‡ 8 Wallace, 123.

§ Am. Steel and Wire Co. *vs.* Speed, 192 U. S., at page 520.

Finally, a certificate of stock in its market price is hardly ever based upon the value of the property-assets — of the corporation. Swinging ten thousand shares of St. Paul preferred in his hand, a resident of Connecticut who sells the same in New York City defies the State to tax the privilege because the vendee is also a non-resident and the corporation property is situated outside of New York!

VI.

The Drummer Cases.

The sole question in chose cases as was said by Justice Bradley (120 U. S. 489–494) was, "Whether it is competent for a State to levy a tax or impose any other restriction *upon the citizens or inhabitants* of other states for selling or seeking to sell their goods in such State before they are introduced therein."

In the case at bar the tax is not upon the broker or other person selling shares of stock, it is not upon the shares of stock but is *upon the transaction which takes place in and is wholly completed within the State.*

The Telegraph Cases.

The tax by the State of Texas was upon the messages sent, and as such messages were clearly communications between citizens of different States and thus "intercourse," the tax did violate the commerce clause.

Telegraph Co. *vs.* Texas, 105 U. S. 460.

It is difficult to see how the decision of this court in the "Telegraph Cases" or of the Circuit Court of Appeals, 8th Circuit, in the "Telephone Case" (118 Fed. Rep. 382), have any application to the questions involved in the case at bar.

VII.

Subjects of taxation arising out of the existence of corporations.

The Legislature has power, among others, to levy taxes upon:

(*a*) The privilege of selling or transferring stocks;

(*b*) Upon the stocks themselves;

(*c*) Upon the property of the Corporation.

In the system of taxation the above are separate taxable entities. The three may be taxed if within the jurisdiction of the State; or two or one, as the case may be.

No litigation was more bitterly fought than the so-called "Special Franchise Tax Cases," finally argued in the Supreme Court of the United States in 1905. The briefs of all the counsel in this case were comprehensive and discussed due process and the denial of equal protection. The opinion of Mr. Justice Brewer is the latest announcement in relation to the taxing power of this State. It was endeavored, in these cases, to demonstrate to the Federal Tribunal, that there was a denial of equal protection, in that under the statute some corporations could avail of deductions, and others could not, and also in that the effect of the enactment was to distinguish between the special franchises of the great mass of the railroad systems in the City of New York, and the subway system which, it was claimed by the railroad corporations, was exempt. These views were disposed of in the opinion of Mr. Justice Brewer, to which we invite the Court's attention.*

* See Metropolitan Street Railway Co. *vs.* State Board of Tax Commissioners, 199 U. S., p. 1, and succeeding cases.

The reluctance of the Courts to interfere with enactments relating to taxation is demonstrated in a long line of cases. The scope of the taxing power enables the State, from time to time, to bring within the purview of its taxing power, *new subjects* which have not been covered by previous legislation, as for example, mortgages owned by citizens of other States on property within the State*; the right of succession to the property of one dying†; debts owing by a resident debtor to a non-resident creditor‡; the rights given to a foreign corporation to carry on business within the State§; the amount of capital employed by a foreign corporation within the State.¶

Likewise, the Courts have been most liberal in recognizing that it becomes necessary for States to select certain classes, or certain subject-matter, as distinguished from other classes and other subject-matter. This principle was elaborately considered in the Kentucky Railroad case,** and that case was followed in the others cited below:

Pittsburg Ry. Co. *vs.* Backus, 154 U. S., 421.
Pacific Express Co. *vs.* Seibert, 142 U. S., 354.
Adams Express Co. *vs.* Ohio, 165 U. S., 228.
Magoun *vs.* Illinois Trust & Savings Bank, 170 U. S., 293.

Nothing further need be added to this discussion but the remarks of the Court in Hopkins *vs* U. S.††

"The services of members of the different stock and produce exchanges throughout the country in effecting sales of the articles they deal in are of a similar nature.

* Savings & Loan Society *vs.* Multnomah County, 169 U. S., 421.
† Magoun *vs.* Illinois Trust & Savings Bank, 170 U. S., 233.
‡ Blackstone *vs.* Miller, 188 U. S., 189.
§ Horn Silver Mining Co. *vs.* New York, 143 U. S., 305.
¶ New York *vs.* Roberts, 171 U. S., 658.
** 115 U. S., 321.
†† 171 U. S., 597, 598.

Members of the New York Stock Exchange buy and sell shares of stock of railroads and other corporations, and the property represented by such shares of stock is situated all over the country. *Is a broker whose principal lives outside of New York State, and who sends him the shares of stock or the bonds of a corporation created and doing business in another State, for sale, engaged in interstate commerce?* If he is employed to purchase stock or bonds in a like corporation under the same circumstances, is he then engaged in the business of interstate commerce? It may, perhaps, be answered that stocks or bonds are not commodities, and that dealers therein are not engaged in commerce. Whether it is an answer to the question need not be considered, for we will take the case of the New York Produce Exchange. Is a member of that body to whom a cargo of grain is consigned from a western State to be sold engaged in interstate commerce when he performs the service of selling the article upon its arrival in New York and transmitting the proceeds of the sale less his commissions? Is a New Orleans cotton broker who is a member of the Cotton Exchange of that city, and who receives consignments of cotton from different States and sells them on 'change in New Orleans and accounts to his consignors for the proceeds of such sales less his commission, engaged in interstate commerce? Is the character of the business altered in either case by the fact that the broker has advanced moneys to the owner of the article and taken a mortgage thereon as his security? *We understand we are in these queries assuming substantially the same facts as those which are contained in the case before us, and if these defendants are engaged in interstate commerce because of their services in the sale of cattle which may come from other States, then the same must be said in regard to the members of the other exchanges above referred to. We think it would be an entirely novel view of the situation if all the members of these different exchanges throughout the country were to be regarded as engaged in interstate commerce, because they sell things for their principals which come from States different from the one in which the exchange is situated and the sale made."*

VIII.

Opinion of Judge Vann.

We direct the Court's attention to the very able, concise, and comprehensive opinion of Judge Vann of the Court of Appeals, which was unanimously concurred in by his learned associates.

This opinion covers all of the questions presented to this Court, and our brief has been merely an elaboration of that opinion. A reading of Judge Vann's opinion will show that that learned jurist examined and considered all of the leading cases on the subject.

Finally.

If there were even a doubt as to the constitutionality of the legislation now attacked, it should be determined in favor of the validity of such legislation, since it affects the revenues of a sovereign State, and is designed to promote a just distribution of the burdens of taxation among its citizens.*

IX.

The order of the Supreme Court of the State of New York dismissing the writ of habeas corpus, should be affirmed.

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HORACE MCGUIRE,
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JAMES G. GRAHAM,
Deputy Attorney-General,
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* King *vs.* Mullins, 171 U. S., 436.

APPENDIX I.

MESSAGE OF GOVERNOR ROOSEVELT.

JANUARY 3, 1900.

Taxation.

The whole problem of taxation is now, as it has been at almost all times and in almost all places, one of extreme difficulty. It has become more and more evident in recent years that existing methods of taxation, which worked well enough in a simpler state of society, are not adequate to secure justice when applied to the conditions of our complex and highly specialized modern industrial development. At present the real estate owner is certainly bearing an excessive proportion of the tax burden. Men who have made a special study of the theory of taxation and men who have had long experience in its practical application are alike in conflict among themselves as to the best general system. Absolute equality, absolute justice in matters of taxation will probably never be realized; but we can approximate it much more closely than at present. The last Legislature most wisely appointed a committee to consider the feasibility of a thorough and far-reaching change in our tax laws; and there is good reason to believe that their forthcoming report will present a scheme which will receive the support of substantially all classes of taxpayers, and which will be of such a character as to commend itself to the most careful consideration of your body upon broad lines.

The law must not only be correct in the abstract; it must work well in the concrete. Experience shows that certain classes or symbols of property which in theory

ought to be taxed cannot under the present practice be reached. Some kinds of taxes are so fertile in tempting to perjury and sharp dealing that they amount to taxes on honesty — the last quality on which we should impose a needless burden. Moreover, where the conditions and complexity of life vary widely as between different communities, the desirability and possibility of certain taxes may seem or be so different that it is hard to devise a common system that will work. If possible the State tax should be levied on classes of property, and in a manner, which will render it collectible with entire fairness in all sections of the community, as for instance the corporation or collateral inheritance tax is now collected. So far as possible we should divorce the State and municipal taxes, so as to render unnecessary the annual equalization of values between the several counties which has proved so fertile a source of friction between the city and the country.

There is a constant influx into New York State of capital, oft-times previously incorporated under the laws of other States, and an increasing number of men of means from other parts of the country, non-residents of New York, come into this State to sojourn and to conduct and be at the head of various business enterprises which are drawn to New York as the financial centre of the whole country. This calls for legislation which shall provide, in a broad and fair spirit, for taxing foreign capital in this State, whether in corporate or individual form, exactly as we tax domestic capital doing business along the same lines.

I call your attention to the fact that the great burden of taxation is local, not State. In the large cities the heavy local charges are mainly due to the action of the local authorities themselves. For this the local authorities are of course responsible. But sometimes taxation is added to by legislative enactment.

On certain points the failure of the tax laws has become so evident that it is possible to provide more or less complete remedies without waiting for a general scheme of reorganization. Again and again in recent years this has been recognized, and through legislative enactment certain species of property which had escaped taxation have been made to pay their proper share of the public burdens. The collateral inheritance tax offers a case in point. The corporation tax offers another. In all these matters of taxation, however, it is necessary to proceed with extreme caution, the path never being so simple and clear as the advocates of any particular measure invariably believe. Every wealthy corporation that perpetrates or is allowed to perpetrate a wrong helps to produce or inflame a condition of angry excitement against all corporations, which in its turn may in the end harm alike the honest and the dishonest agents of public service and thereby do far-reaching damage to the whole body politic. Much of the outcry against wealth, against the men who acquire wealth, and against the means by which it is acquired, is blind, unreasoning and unjust; but in too many cases it has a basis in real abuses; and we must remember that every act of misconduct which affords any justification for this clamor is not only bad because of the wrong done, but also because the justification thus given inevitably strengthens movements which are in reality profoundly anti-social and anti-civic. Our laws should be so drawn as to protect and encourage corporations which do their honest duty by the public; and to discriminate sharply against those organized in a spirit of mere greed, or for improper speculative purposes.

There is plenty of misconduct, plenty of selfish disregard of the rights of others, and especially of the weak. There is also plenty of honorable and disinter-

ested effort to prevent such misconduct or to minimize its effects. Any rational attempt to prevent or counteract the evils, by legislation or otherwise, is deserving of hearty support; but it cannot be too deeply impressed upon us that such attempts can result in permanent good only in proportion as they are made in a sane and wholesome spirit, as far removed as possible from whatever is hysterical or revolutionary. It is infinitely better when needed social and civic changes can be brought about as the result of natural and healthy growth than when they come with the violent dislocation and widespread wreck and damage inevitably attendant upon any movement which is revoluntionary in its nature.

GOVERNOR ODELL'S MESSAGE.

STATE OF NEW YORK.

EXECUTIVE CHAMBER,

ALBANY, *January* 2, 1901.

Taxation.

The subject of taxation is one that is of the most import to the people of the State at large. The attempt from time to time to shift the responsibility from one class of property to the other, with but correspondingly slight decrease in the burden borne by the real estate throughout the commonwealth, does not fulfill the requirements of the constituency which we represent. I have looked forward with pleasurable anticipation to the day when the State of New York would no longer find it necessary to levy a direct tax for State purposes. The franchise tax meets to a limited degree this ex-

pectation. The Stranahan bill, the purpose of which was to impose a tax upon all mortgages, came nearer its consummation than any law that had ever before been presented to the Legislature. The complications and antagonisms which it aroused made it unwise to act upon a matter of such great importance during the last session of the Legislature; so that to-day we have the same problem confronting us as has been before us for so many years.

All corporations receive from the State certain rights. They have, first, the right to exist. In addition some acquire from municipalities, through the action of the State, rights to build, maintain and operate their properties. It seems to me, therefore, that capital of this character in our State should pay a tribute to the creating power for that which they have received. This justifies the present laws taxing corporations for State purposes, and all future corporation tax laws should be based upon this principle. That the present law works hardship to some and is not fully enforced in other cases is apparent. This no makeshift remedy will correct, but an entirely new system should be framed to meet existing conditions and a fair and equitable recompense from all corporations enjoying State protection and favors should be exacted. Exemptions should be given by the localities rather than by the State, because it is the former which receives the greatest benefit, and all corporations should therefore pay a tax based upon their earning power. But few of the many corporations in the State are now taxed in this manner, and therefore an unfair discrimination exists. A correction of this error would add greatly to corporation tax receipts by the State.

It addition to this, corporations organized under the transportation laws, which include all those using public utilities, should also pay an additional tax. To correct

many abuses which grew up under the administration of this feature of our law, the Franchise Law was enacted. While agreeing with the principle, I am convinced that the method of its administration is crude and should be more clearly defined.

We have in addition to these as a source of revenue a great number of banks, both national and State, trust and insurance companies, some of which are assessed at a high figure and others at a valuation so low as to be absurd. It is a well known fact that trust companies do not pay their proportion of the State's taxes, and that this discrimination is of such a character as to enable them to thrive and do business where a national or State bank cannot. The total amount of the capitalization, undivided profits and surplus of banks amounts to $385,133,329, of which about $55,000,000 is in real estate, leaving about $330,000,000 in personal property in such capital and surplus. Trust companies and banks should pay a tax upon their capital to the State, because of their use of our courts and for the other privileges which are accorded them. One per cent. upon this amount could be exacted, which would bring into the treasury between three and four million dollars, and would not materially interfere with the collection of taxes in the various localities. In addition to this the surplus of savings banks and insurance companies, which is now held as a reserve, and which amounts to $469,707,751, should pay its proper proportion of the taxes, because it is in effect the capital of such banks and companies, and should be so treated. I do not believe in attacking the deposit of the poor man, whether in savings banks or in the form of life insurance. Every possible inducement should be afforded by the State to encourage saving by those who labor and desire to lay up a fund against a "rainy day." But this surplus which accumulates from time to time should bear its

portion of the tax burden, and the enactment of a law which would tax it at the rate of one per cent., as above, would not be too great in consideration for the protection and safeguards which our State throws around savings banks and insurance companies. These suggestions, in my judgment, if favorably acted upon, will greatly relieve the burden upon real estate. In return for this I should favor exemption from payments by banks, other than savings banks, of all local assessments for State purposes, and in the case of savings banks and insurance companies from all other taxation except upon their real estate.

The inequalities resulting from the taxation of mortgages are very great, the burden being borne principally by estate and trust funds, nearly all other mortgages escaping taxation.

If the suggestions before outlined should meet with favor, I should recommend exempting mortgages entirely from taxation, in the belief that their taxation should be left to the operation of the transfer tax law, the present unfair discrimination being thereby corrected, and a lower rate secured to borrowers.

GOVERNOR ODELL'S MESSAGE.

January 1, 1902.

Corporations.

At the last session of the legislature I recommended the liberalization of our corporation laws, believing that such policy would benefit our State and its manufacturing interests.

The wisdom of such legislation has already been proven. During the past fiscal year 511 more incor-

porations and twenty-two more corporations showing increases in their capital stock have resulted. The total capital stock of new companies and increase of capitalization by old companies amounted to $481,365,855, being an increase over the previous year of $193,524,-171, upon which there have been received for incorporation $330,594.43. The largest amount at which any one company was capitalized was $17,000,000. Two companies increased their capital by $50,000,000.

While this is gratifying, I regret to say that the largest combinations are still refusing to incorporate within out State. A comparison shows that up to a capitalization of $3,000,000, our laws offer more favorable opportunities than those of other States. Beyond this, however, on other than manufacturing corporations, the discrimination seems to be against us. I do not believe that we should make any further concessions, because it is certain that by incorporation in New York advantages are offered which are more than commensurate with the increased expense. But it is unfortunately true that foreign associations, while nominally located elsewhere, are virtually transacting all of their business within our borders. This is unfair, because the wealth of our people which is invested in their shares is taken out of our taxable values. New York, therefore, loses a proportion of taxable valuation that by right belongs to it. It is not desirable that any action should be taken by the legislature which would embarrass or in any way hinder the administration or building up of any company, providing that it is transacting its business without detriment to the interests of our State. It seems, however, for the privileges which they enjoy and without which it would be impossible to succeed, they should not be entirely free from taxation. Their shares should be subject to some form of taxation, as they undoubtedly are, under our

present laws. The difficulty, however, is to reach them. If it were possible to secure lists of stockholders who are domiciled in the State, it would be easy to place such valuations upon our assessment rolls and compel the owners to pay their proportionate share of our State and municipal expenses.

While the stock of domestic corporations which pay a tax on their capital stock is not taxable under our laws in the hands of individuals, the same right should not be extended to stockholders of foreign corporations, unless they shall have filed with the Secretary of State, a certificate of their incorporation and have paid upon their capital stock annually a tax of say one mill per dollar up to and including a capitalization of ten million dollars and one hundred dollars per million dollars upon capitalization above that amount as a franchise tax to the State for the privilege of doing business in the State of New York and relieving their stockholders resident in this State of taxes (except the transfer tax), which would otherwise be assessed against them as individual owners of such shares. Such tax upon the stock in foreign corporations should not be subject to deduction for personal debts. The interest of the stockholders would cause him to demand of his association the filing of an incorporation certificate in this State and would thus make certain the collection of taxes which now escape entirely.

I recommend, therefore, that the local assessors be given authority to compel the listing of stock holdings and that only such assessments be omitted from the total return as represent the stock of domestic and foreign corporations which have filed their certificates in this State and have become subject to the payment of the franchise tax referred to. The revenue thus derived in connection with the tax on mortgages recommended

would undoubtedly provide ample funds for the ordinary and necessary expenses of government.

It was aimed by legislation of last year to take away from manufacturing corporations incorporated under the laws of other States, unless they had at least forty per cent. of their property within the State, the exemption which is granted to domestic corporations. That this has been a failure has been instanced by some recent incorporations filed, whereby certain companies have taken the amount of their corporate holdings in this State and incorporated under the same name and with the same officers as designated in the incorporation in other States, thereby evading the taxes which they would otherwise be liable for.

To correct this injustice should be your aim. No joint stock company should be permitted to incorporate with the same name as that borne by corporations of other States, if for no other reason than to prevent confusion, and no corporation thus formed should be allowed to merge with or to be operated by a foreign corporation, unless such foreign corporation has filed its certificate with the Secretary of State.

GOVERNOR ODELL'S MESSAGE.

STATE OF NEW YORK:

EXECUTIVE CHAMBER,

ALBANY, N. Y., *January* 7, 1903.

In imposing any additional taxation due regard must be had for the rights of individuals, corporations, and the localities. It is a well-known fact that notwithstanding the constant reduction in the direct taxes of the State there has been a very great increase in local

taxation, and therefore whatever is intended to increase the State's revenue should not be at the expense of increasing local burdens. It has always appeared to me to be dangerous to lodge power in any taxing officer which permits him to discriminate in the levying of assessments, and that the nearer therefore we can approach a system which has for its object a constant valuation, the nearer we are to a perfect system of taxation.

The Franchise Tax, which is still the subject of litigation, seems to me through the few years that it has been in operation to have demonstrated that it is inequitable, and a source of annoyance and constant litigation. Some corporations can bear this burden without serious results following. But as is well known, the continued increase of street railroad traffic and the demands for lighting, water, telephone and other public utility facilities have perhaps brought into existence many corporations which cannot bear the excessive burden which is now imposed under the present law.

Under the operation of the Franchise Tax Law it was sought to impose upon all those using streets and highways a greater tax for the privileges thus accorded. There is a great misconception, however, as to the results produced. A single corporation in the boroughs of Manhattan and the Bronx has seven-sixteenths of the total valuation of such properties in these two boroughs. This corporation is paying as much tax as many great railroad systems. By provisions of the law it is entitled to deductions because of car licenses and percentages paid to the city — at least so the law was interpreted until a recent decision of the court in a case in Buffalo, which held that such tax should not be deducted. The increase in receipts under this law upon the one hundred and sixty-seven millions of franchise

valuations in Manhattan and the Bronx, after making all allowances for the tangible properties in the streets and the deductions ordered by the courts of one-third of the total assessment, are four hundred and thirty thousand dollars of new revenue. If this same proportion were carried out therefore in the city of New York it would mean an added revenue to the local treasury of $860,000. The State has accorded to every locality the power to enter into contracts for all franchises which may be granted, and it seemed to me at the time of the enactment of this measure that ample provision was possessed by the cities to properly guard and protect their interests and that to surrender therefore what should belong to the State to the municipalities — that is, franchise rights — was unnecessarily giving away powers which should belong to and which are inherent in the State. With corporations as with individuals we should be fair, and while perhaps these corporations had not been paying the proportion which they should, still whatever is of value for a franchise should be paid for to the State, because it creates the corporation; while for the use of the streets there should be a direct contract between the company seeking such privileges and the municipality affected. I am of the opinion also that under the present law those who might desire to use the powers possessed for taxing purposes could do so to the great disadvantage of almost any corporation or with resultant unfairness to the municipalities affected. It seems to me, therefore, that the only safe and conservative way of assessing such corporations is upon their earning capacity, a plan which would not permit unfair discrimination. This would avoid many complications and would be a much safer system than the one now in operation.

The present method of mortgage taxation is unfair because it reaches only a small proportion of the whole,

and permits an excessive tax. Whatever may be the reasoning as to the propriety or justice of imposing such a tax, the experience of other commonwealths has demonstrated beyond any question or doubt that the tax upon mortgages must be paid by the borrower and, therefore, to that extent it becomes double taxation. We must consider, however, the disinclination of local assessors to relieve those who loan money, upon the theory, in which there is much justice, that if mortgage taxation were entirely abolished a greater burden would be imposed upon real estate free from mortgage debt. This subject presents many peculiar conditions, and, while some hardships may be imposed, it is well for us to understand that it will be impossible to entirely relieve from the ultimate costs of borrowing those who are unfortunate enough to have their houses or lands burdened with mortgage. We have endeavored to protect the borrower, however, by fixing a maximum interest rate. The cheapness of money has reduced this rate, and whenever the lender of money is satisfied that his rate of interest will be as large as he can secure upon collaterals upon which no tax is due, he will loan upon real estate, and millions of money that is now invested in other directions will immediately become available for investment in real estate mortgages. We may assume, therefore, that while it is impossible at the present time to entirely eliminate some form of taxation upon mortgages wherever found that we can still satisfy the localities by a more equitable distribution of the tax and thus bring about a lowering of the tax, with the natural sequence a lowering of the interest rate. Whatever tends to correct an abuse in part is in the direction of equity and justice, while not fully satisfying every demand. In view, therefore, of the failure to secure some such equitable form of mortgage taxation through the opposition of those who felt that their local assess-

ment-rolls would be decreased and a greater burden of local taxation placed upon real estate, we should not attempt to correct the evil entirely because failure would again result. Whatever of injustice has been done, or whatever of inequality is apparent, can be well considered when the subject of indirect revenue is under consideration. And in framing new laws we can avoid errors which produce hardship by exacting unjust tribute. It appears to me, therefore, that in providing new revenues advantage should be taken of a more liberal mortgage tax and the reassumption of privileges which were surrendered to localities under the so-called Franchise Tax Law.

I recommend therefore that the rate of taxation upon mortgages shall not exceed four mills annually, and be in lieu of all other taxes, the mortgages to be assessed locally, two-thirds of the amount collected to go into the local treasuries and one-third to the State, excepting only from the operation of this law mortgages and bonds held by savings banks, fraternal orders, local buildings and loan associations, life insurance companies and charitable, religious and educational bodies. This law would produce as near as can be estimated eight millions of dollars annually, two-thirds of which, amounting to about $5,350,000, would go to the localities and $2,650,000 to the State. The local machinery for the collection of the tax will be much simpler than a State bureau because it will be the local registrar's and county clerk's offices that will furnish the desired information to each locality to determine its assessment, leaving to them the corrections and deductions which should be made. The constant fear that mortgages will be subject to excessive or varying rates of taxation will be thus eliminated and borrowers and lenders can negotiate their loans with a sure knowledge of the tax obligation.

Bonds of corporations, owing to the difficulty of reaching them for taxing purposes, can be left for assessment under existing law. The Franchise Tax Law should then be amended so that a tax could be assessed upon gross earnings, at double the present State tax, the revenue to be paid direct to the State, relieving public utility companies from local taxation, except upon tangible property in the streets, and other real and personal estate. This will operate much more equitably than does the present law, and will not be an unjust burden upon the corporations that are affected. I estimate that from the mortgage tax and the amended Franchise Tax Law the increased revenues will amount to $3,530,000. Whatever may be lost in the total of the assessments under the Franchise Tax Law can be more than replaced by the listing of mortgages, and would therefore increase rather than decrease the debt limit of municipalities for bond issues.

For further revenues I recommend a tax of ten cents on each notary certificate, which will produce $750,000, and a tax of ten cents per hundred dollars for the recording of all transfers of property, real or personal, to be known as a recording tax, which from the best available data at hand will produce $1,200,000 annually, making the total result $5,480,000 in new revenue. These recommendations, if enacted into law, will produce enough funds for the present and the constant increase of receipts under their operation will be sufficient to care for the increased expenditures of the State outside of canal improvement, and will thus redeem the pledge that has been made for entire relief from direct taxation for State purposes.

The enactment of these laws would take away from the localities franchise revenues of $1,325,000. Inasmuch as of the total assessed valuation of the personal property of the State, from the best estimates obtain-

able, there is only $135,000,000, in the hands of individuals, and assuming that all this represents mortgages and that the tax were two per cent., the localities would lose $2,700,000 by the abolition of the present mortgage tax, so that the total loss would be $4,025,000, while the new income from the mortgage tax would be $5,350,000. In other words, the localities would benefit by the enactment of these laws to the extent of $1,350,000, and it would still leave bonds and securities other than real estate mortgages held by individuals to be taxed locally.

I know that there may be perhaps a prejudice against the changes thus recommended, but we should not for that reason be deterred from according rights and protecting all interests equally so that unfair burdens may not be imposed. I believe when the subject is fully understood that the legislature will reach the conclusion that the law as it stands to-day is unwise and against public policy. Stockholders are but individuals and they should have the same rights as owners of real estate or other forms of personal property.

GOVERNOR HIGGINS' MESSAGE.

STATE OF NEW YORK.

EXECUTIVE CHAMBER,

ALBANY, *January* 3, 1906.

Taxation.

The great burden of taxation is local and not State in its character, is due to the activities of the local authorities and is rapidly increasing. The cost of the

city government of New York city for the past six years is as follows:

1900	$90,778,972 48
1901	98,100,413 43
1902	98,618,600 88
1903	97,119,031 10
1904	106,674,955 09
1905	110,525,259 04
The appropriations for 1906 are	116,805,490 37

The net bonded debt of New York city on December 31, 1900, was $280,895,762.45. This had risen on November 30, 1904, to $445,889,941.

All tax measures have their vigorous critics. Taken one by one, each may be shown to work hardship and injustice. Such criticisms are not always disingenuous. For example, the mortgage tax law, which is a law to equalize and reduce taxation on mortgages and to prevent tax dodging, is denounced as "pernicious double taxation." Obviously, those who make this argument seek the exemption of all mortgages from taxation, rather than the restoration of the old law under which taxation of mortgages was not only double in the sense in which that term is used, but also grossly uneven and discriminating and at a higher rate. Opponents of each form of indirect taxation state their disinterested economical belief in the general property tax, which experts in taxation say is worthy only of an age of mental and moral darkness and degradation; inequality of assessment, failure to reach personal property and incentive to dishonesty being among its more glaring defects. Governor Roosevelt said in 1899 that "our system of taxation is in utter confusion, full of injustices and queer anomalies." A fundamental problem which confronts the State, now as heretofore, is that of

bringing about greater fairness in distributing the weight of taxation. Mediæval survivals, selfish expedients and inequitable makeshifts should, wherever possible, be superseded by provisions that shall better realize the principles of justice which should govern the State in its relations with the citizen.

In dealing with the problem of tax reform it must be remembered that we live in a practical world, and that volunteers for the purpose of carrying the load of direct or indirect taxation will be few. Men who would not dodge their creditors have no scruples in evading the tax collector. We may content the class that opposes the mortgage tax by exempting personal property and putting the additional burden on land. We may satisfy the class that opposes the stock transfer tax by shifting the burden to transfers on the Produce Exchange, but as we tranquillize one element we arouse another, and no lasting peace is possible until a fair final settlement of the question is had.

The last session of the Legislature was characterized by special attention to the subject of raising revenues sufficient to meet the obligations of the State. Charitable bequests were exempted from the transfer tax. *The mortgage tax law and the stock transfer tax law were adopted.* The tax on the surplus of savings banks was allowed still to remain on the statute books. What was left undone showed a lamentable disregard for party honor. I again recommend that the tax on the surplus of savings banks be repealed, and I urge you to give the other measures a fair trial, perfecting them if necessary, before interfering with their fundamental principles. With proper economy the revenues of the year will be sufficient and, at present, no necessify for new taxes confronts us; but the barge canal debt and the highway improvement debt will introduce additional reasons for further study of the tax problem. * * *

I recommend that a commission, consisting in part of members of the Legislature and in part of persons in private life, be provided, whose duty shall be to inquire into the subject of assessment and taxation for State and local purposes, the operation and effect of the laws relating thereto, and the expediency of revising and amending such laws so as to establish a more equal and just system of raising public revenues. The time seems ripe for such a commission in this State to present a comprehensive plan to rationalize the present tax system.

FILE COPY.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1906.

No. 310.

Office Supreme Court, U. S.
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THE PEOPLE OF THE STATE OF NEW YORK on the relation of ALBERT J. HATCH,

Plaintiff-in-Error,

vs.

EDWARD REARDON, Peace Officer of the County of New York,

Defendant-in-Error.

Brief for District Attorney of New York County.

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DISTRICT ATTORNEY,
NEW YORK COUNTY.

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EDWARD REARDON, a Peace Officer of the County of New York,
Defendant-in-Error.

District Attorney's Brief.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Statement of Case.

This case comes to this Court by writ of error to the Supreme Court of the State of New York (Rec., p. 36) after a dismissal of a writ of habeas corpus.

The plaintiff in error was arrested on the 8th day of June, 1905 (Rec., p. 2), upon a warrant issued by the Hon. John B. McKean, Justice of the

Court of Special Sessions of the First Division of the City of New York (Rec., p. 5), sitting as a Magistrate, which charged him with having committed a misdemeanor, a violation of Chapter 241 of the New York Laws of 1905 (The so-called Stock Stamp Tax Law) in that he had made a certain

> "sale and delivery of certain shares of stock of certain railroad corporations without making any bill or memoranda of such sale or affixing any stamp or stamps to such bill or memorandum or in any way paying the tax as required by said Act" (Rec., p. 5).

The complaint upon which the warrant was issued was made by one Charles W. Maury, who deposed that on June 7, 1905, the plaintiff in error, a resident of Stamford, Connecticut, had sold in the Borough of Manhattan, City, County and State of New York and delivered in the said City and County of New York two certificates

> "assigned in blank without making and delivering to deponent any bill or memorandum of such sale whatsoever, and without affixing to any bill or memorandum thereof or to any other paper any stamp or stamps and without paying any tax on making such sale and delivery though requested by deponent so to do, in violation of the provisions of an Act of the Legislature of the State of New York, entitled 'An Act to amend the tax law by providing for a tax on transfers of stock,' known as Chapter 241 of the Laws of 1905" (Rec., p. 6).

The complaint stated that the shares so sold and delivered were:

No. of Shares.	Corporation.	Par Val.	Actual Val.	Organized under laws of
100	Southern Ry. Co....	$100	$30.75	Virginia
100	Chgo., Mil. & St. P..	100	172.00	Wisconsin

(Rec., p. 6. See also Petition for Writ of Habeas Corpus, Rec, p. 2.)

A writ of habeas corpus was obtained by plaintiff in error claiming that Chapter 241, Laws of 1905, was unconstitutional and void, and thereafter a return was made to said writ (Rec., p. 9). Plaintiff in error filed an answer to said return denying that the warrant was valid for the reason set forth in relator's petition for the writ of habeas corpus (Rec., p. 12). Upon a hearing at Special Term of the Supreme Court the writ was dismissed (Rec., p. 13), and thereafter the order of Special Term was affirmed at the Appellate Division of the Supreme Court (Rec., p. 15). An appeal was then taken to the Court of Appeals whereupon the order of the Supreme Court was affirmed and the proceedings remitted to the Supreme Court, there to be proceeded upon according to law (Rec., pp. 33-34), and thereafter an order of the Supreme Court was made directing the order of Special Term to be carried into execution and effect (Rec., pp. 34-35).

The elaborate opinion of the Court of Appeals contained in this record is reported (184 N. Y., 431).

Introductory.

The act of New York whose constitutionality is attacked upon this appeal is Chapter 241 of the Laws of 1905, which in terms added an additional article (Art. XV—sections 315 *et seq.*) to the general tax law of 1896 (Chap. 908).

Section 315 of the act in part provides:

> "There is hereby imposed and there shall imediately accrue and be collected a tax as herein provided, on all sales, or agreements to sell, or memoranda of sales or deliveries or transfers of shares or certificates of stock in

any domestic or foreign association, company or corporation, made after the first day of June, nineteen hundred and five, whether made upon or shown by the books of the association, company or corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale whether entitling the holder in any manner to the benefit of such stock, or to secure the future payment of money or the future transfer of any stock, on each hundred dollars of face value or fraction thereof, two cents. * * *

The payment of such tax shall be denoted by an adhesive stamp or stamps affixed as follows: In case of sale where the evidence of transfer is shown only by the books of the company the stamps shall be placed upon such books; and where the change of ownership is by transfer certificate the stamp shall be placed upon the certificate; and in cases of an agreement to sell or where the transfer is by delivery of the certificate assigned in blank there shall be made and delivered by the seller to the buyer a bill or memorandum of such sale to which the stamp provided for by this article shall be affixed; and every bill or memorandum of sale or agreement to sell before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers, and no further tax is hereby imposed upon the delivery of the certificate of stock, or upon the actual issue of a new certificate when the original certificate of stock is accompanied by the duly stamped memorandum of sale."

Section 317 provides that any person who should make any sale without paying the tax imposed by Section 315 and without having the stamps provided for in this article affixed thereto, should be guilty of a misdemeanor and subject to fine or imprisonment or both at the discretion of the Court.

It is under the provisions of Section 317 that the

District Attorney procured the arrest of the plaintiff in error.

Before the Appellate Division of the Supreme Court and in the Court of Appeals the plaintiff in error urged not only that Chapter 241 of the Laws of 1905 violated the Constitution of the United States, but also that it was passed in violation of the Constitution of the State of New York. His petition for the writ of error, however, now urges only alleged violations of the Constitution of the United States.

Assignments of Error.

The plaintiff in error challenges the constitutionality of the New York act upon the following grounds:

1. That the Act is in contravention of the Fourteenth Amendment to the Constitution of the United States in that it deprives the relator of his liberty and property without due process of law.

2. That the Act is in contravention of the Fourteenth Amendment to the Constitution of the United States in that it denies to the relator the equal protection of the laws.

3. That it is in contravention of Section 8, Article 1 of the Constitution of the United States in that it amounts to a regulation by the State of New York of commerce with foreign nations and among the several states.

4. That the transaction was an intestate commercial transaction within the meaning of the Constitution of the United States and could not be made a misdemeanor by the State of New York and further that under the Constitution of the

United States the transaction set forth in the writ of habeas corpus could not be taxed by the State of New York as attempted to in and by Chapter 241 of the New York Laws of 1905.

ARGUMENT.

POINT I.

The decision of the Court of Appeals has settled that Chapter 241 of the Laws of 1905 is not in conflict with the Constitution of the State of New York.

It was strenuously argued by the learned counsel for the plaintiff in error in the Appellate Division of the Supreme Court and also in the Court of Appeals, that the act in question was not properly passed by the State Legislature and that in other respects it violated the Constitution of the State of New York. The Court of Appeals, however, having decided that the Act did not in any respect violate the Constitution of the State of New York, its decision precludes this question from being raised in this Court.

West River Bridge Co. *v.* Dick., 6 Howard, 507;
Bucher *v.* Cheshire R. R., 125 U. S., 555;
Bells Gap R. R. *v.* Pennsylvania, 134 U. S., 232;
Lewis *v.* Monson, 151 U. S., 545;
Adams Express Co. *v.* Ohio, 165 U. S., 194;

Long Island Water Supply Co. *v.* Brooklyn, 166 U. S., 685;
Merchants' Bank *v.* Pennsylvania, 167 U. S., 461, 462;
Rasmussen *v.* Idaho, 181 U. S., 198, 200;
Williams *v.* Parker, 188 U. S., 491, 502;
Metropolitan St. Ry. Co. *v.* N. Y., 199 U. S., 1, 35;
Michigan Central R. R. *v.* Powers, 201 U. S., 245, 290.

In *Merchants' Bank v. Pennsylvania,* it was argued that the statute was in conflict with the Constitution of Pennsylvania and this Court said:

> "It is sufficient to say in reference to this contention that the decision of the Supreme Court of the State of Pennsylvania sustaining the statute is conclusive in this court, as to any question of conflict between it and the State Constitution."
>
> Merchants' Bank *v.* Pennsylvania, 167 U. S., 461, 462.

In *Rasmussen v. Idaho,* Brewer, J., said:

> "The judgment of the Supreme Court of Idaho establishes that there is no conflict between this legislation and the Constitution of the State, and it is not within the province of this Court to review that question, *Merchants' Bank v. Pennsylvania,* 167 U. S., 461, and cases cited in the opinion."
>
> Rasmussen *v.* Idaho, 181 U. S., 198, 200.

In *Metropolitan St. Ry. Co. v. New York,* Brewer, J., said:

> "The decision of the Court of Appeals settles that there is nothing in the law or the proceedings in this case in conflict with the Constitution of that State."
>
> Metropolitan St. Ry. Co. *v.* New York, 199 U. S., 1, 35.

In *Michigan Central R. R. Co. v. Powers*, Brewer, J., said:

> "The unconstitutionality of the statute may depend upon its conflict with the Constitution of the State or with that of the United States. If conflict with the state constitution is the sole ground of attack, the Supreme Court of the State is the final authority, *Merchants Bank v. Pennsylvania*, 167 U. S., 461, and cases cited in opinion, while in the other case the ultimate decision rests with this Court."
>
> Michigan Central Ry. *v.* Powers, 201 U. S., 245, 290.

POINT II.

A taxing statute of a state should not be declared unconstitutional unless clearly opposed to the Constitution of the United States.

The decisions of this Court have made a clear distinction in the consideration of statutes of the various states which have been brought up for review. Statutes of the states purporting to be passed in the exercise of police power and other general statutes have received closer scrutiny

than those which the State has deemed necessary to secure its revenue. Taxing statutes, being so essential to the conduct of the State governments and so closely associated with the State rights guaranteed under the Constitution, are never declared unconstitutional unless the defects are so great as to be clearly subversive of some distinct constitutional provision. The presumption of constitutionality is peculiarly applicable to statutes imposing state taxation.

King *v.* Mullins, 171 U. S., 404, 436.
Henderson Bridge Co. *v.* Henderson City, 173 U. S., 592, 614, 615.
Connolly *v.* Union Sewer Pipe Co., 184 U. S., 540, 562, 563.

In *King v. Mullins*, an action of ejectment was brought under a statute of West Virginia under which lands liable to taxation were forfeited to the state by reason of the owner not having them placed during five consecutive years in the proper land books for taxation. The act gave the owner, after the sale, due notice and a right to intervene and secure a redemption. The statute, however, exempted from the act tracts of less than one thousand acres.

Justice Harlan said:

> "The judiciary should be very reluctant to interfere with the taxing systems of a state, and should never do so unless that which the State attempts to do is in palpable violation of the constitutional rights of the owners of property. Under this view of our duty, we are unwilling to hold that the provision referred to is repugnant to the clause of the Fourteenth Amendment forbidding a denial of the equal protection of the laws.
>
> King *v.* Mullins, 171 U. S., 404, 436.

In the *Henderson Bridge Company* case, the City of Henderson, Kentucky, had taxed a railroad bridge with its approaches, piers, etc., extending from a point within that city on the Kentucky shore across the Ohio River to low water mark on the Indiana shore. The bridge belonged to the Henderson Bridge Company, a Kentucky corporation, and was managed and cared for by the Louisville & Nashville Railroad; also a Kentucky corporation. It was claimed that the State of Kentucky had no power to tax the bridge, as the property outside of the low water mark on the Kentucky shore was beyond the protection of the city authorities and that the imposition of such tax was the taking of private property for public use without just compensation, in violation of the Fourteenth amendment of the Constitution. Mr. Justice Harlan said:

> "But in order to bring taxation imposed by a State or under its authority within the scope of the Fourteenth Amendment of the National Constitution the case should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that such taxation by its necessary operation is really spoliation under the guise of exerting the power to tax. As an act of Congress should not be declared unconstitutional unless its repugnancy to the supreme law of the land is too clear to admit of dispute, so a local regulation under which taxes are imposed should not be held by the courts of the Union to be inconsistent with the National Constitution unless that conclusion be unavoidable. All doubt as to the validity of legislative enactments must be resolved, if possible, in favor of the binding force of such enactments. In the case before us the state court rejected the idea that the bridge property in question was entirely beyond municipal protection and could not receive any of the benefits derived from the municipal

government of the city of Henderson. We cannot adjudge that view to be so clearly untenable as to entitle the defendants to invoke the principle that private property cannot be taken for public use without just compensation."

Henderson Bridge Co. v. Henderson City, 173 U. S., 592, 614, 615.

In *Connolly v. Union Sewer Pipe Co.*, the "anti-trust" statute of Illinois provided that it should be unlawful to enter into a combination in restraint of trade and any contract or agreement made in violation of the act should be absolutely void and that the act should not apply to agricultural products or live stock while in the hands of the producer or raiser. The statute was declared unconstitutional and the Court in distinguishing *Magoun v. Ill. Trust & Savings Bank*, 170 U. S., 283, and the *American Sugar Refining Co. v. Louisiana*, 179 U. S., 89, which cited *Bells Gap Railroad v. Pennsylvania*, 134 U. S., 232, said:

"The decision now rendered is not at all in conflict with the views expressed in the two cases just cited. It is sufficient to say that those cases had reference to the taxing power of the State, and involved considerations that could not, in the nature of things, apply to a state enactment like the one involved in the present case. The power to tax persons and property is an incident of sovereignty, and the extent to which it may be exerted has been indicated in numerous cases. Taxing laws, it has been well said, furnish the measure of every man's duty in support of the public burdens and the means of enforcing it. A tax may be imposed only upon certain callings and trades, for when the State exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an

> intolerable burden if a State could not tax any property or calling unless, at the same time, it taxed all property or all callings. Its discretion in such matters is very great and should be exercised solely with reference to the general welfare, as involved in the necessity of taxation for the support of the State. A State may in its wisdom classify property for the purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States, but different considerations control when the State, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade."
>
> Connolly *v.* Union Sewer Pipe Co., 184 U. S., 540, 562, 563.

Under this rule, this Court should not, as asked by the plaintiff in error, **assume facts not presented by the record** to bring the act within the scope of the **"drummer cases"** and so void as interfering with interstate commerce. Likewise no facts should be assumed which might render the act open to other constitutional objections.

POINT III.

The tax imposed by Chapter 241 of the Laws of 1905 is a tax on transfers and not a direct tax on property.

The Court of Appeals of New York expressly held in this case that the tax in question is not imposed upon property, but upon the transfer

of a certain class of property extensively bought and sold throughout the State (Rec., p. 51).

Again the Court of Appeals said

> "The tax in question is an excise tax which need not depend upon any principle of valuation or on any notice to the taxpayer. It is not a direct tax governed by the rule of appraisement, but an indirect tax governed by the rule of uniformity. It is not like a general tax upon the bulk of property in the state which must be paid in any event, for if there is no sale, there is no tax."
>
> (Rec., p. 51; 184 N. Y., 431, 446.)

In *Brooklyn City R. R. v. New York*, 199 U. S., 48, 50, Brewer, J., said:

> "A license fee is understood to be a charge for the privilege of carrying on a business or occupation, and is not the equivalent or in lieu of a property tax."

A bare reading of the words of the statute indicates clearly that the tax is not imposed as a charge upon the shares, does not affect their title or their free transfer and cannot be collected by the sale of the shares as is so usually provided by statutes laying direct taxes. This tax is merely upon "all sales and agreements to sell" and is enforced by the provisions of Section 317 making it a misdemeanor to neglect or refuse to put on the stamps required. As has been pointed out by Judge Vann of the Court of Appeals, the tax may never accrue if no sale be made; should the property remain in the safe deposit vaults of the owners it will entirely escape taxation under this act. It is only when the privilege of transferring or selling stock is invoked that the tax becomes payable.

The plaintiff in error while conceding that the tax was nominally one on transfers, argued in the

state courts that as the final incidence of the tax was upon property the tax was really one on property and that taxation of the sale of a commodity was practically the taxation of the commodity itself.

Reliance was placed upon:

> Welton *v.* Missouri, 91 U. S., 275, 279;
> Cook *v.* Pennsylvania, 97 U. S., 566, 573;
> Brown *v.* Maryland, 12 Wheat., 419, 444;
> Nicol *v.* Ames, 173 U. S., 509, 521;
> Fairbanks *v.* U. S., 181 U. S., 293,

where the opinions contain certain dicta which seem to sustain that contention.

In *Brown v. Maryland,* the question now urged was not squarely presented and in *Welton v. Missouri* the tax was on the sale of foreign goods and not on local goods and the law was held void under the commerce clause. In *Cook v. Pennsylvania,* the auctioneer's tax was based on the sale of foreign goods only and was likewise held void under the commerce clause. Chapter 241, Laws of 1905, makes no distinction against the transfer of shares of foreign corporations.

The question now argued was squarely raised however in the case of *Clark v. Titusville,* where the City of Titusville had imposed a tax on all merchants based upon the amount of their sales, there being a number of grades of retail dealers and a number of grades of wholesale dealers and the tax being at different rates for each grade.

The Court said:

> "Plaintiff in error, however, contends that the tax in the case at bar is a tax on *property,* not on the privilege to do business, because

> the final incidence of the tax is on the merchant, and is paid by him. But every tax has its final incidence on some individual. That effect, therefore, cannot be urged to destroy well recognized distinctions. The tax in the case at bar is a tax on the privilege of doing business regulated by the amount of sales, and is not repugnant to the Constitution of the United States."
>
> Clark *v.* Titusville, 184 U. S., 329, 333, 334.

In *Foppino* v. *Speed*, 199 U. S., 501, the plaintiff in error was compelled to pay for a license to sell liquors on a ferry-boat in the City of Memphis, in the State of Tennessee, the ferry-boat plying between ports in the States of Arkansas and Tennessee, and it was objected that the tax was unconstitutional, as the ferry-boat was engaged in interstate commerce. It was further argued that the tax upon the privilege of selling the liquor was in effect a tax upon the liquor itself, which would be clearly objectionable under the authorities.

> See Brief for Plaintiff in Error, pp. 508-509.

The Court, however, distinguished these authorities and said:

> "Here, however, there is no taxation of any *property* whatever, either of the boat or of the plaintiff in error. He is simply called upon to pay a tax for the *privilege of doing the business* in which he was engaged—that is, the retailing of intoxicating liquors at the bar of the ferry-boat while that boat was within the jurisdiction of the State of Tennessee. The fact that he was so engaged within the actual territory of that State cannot be blotted out in such a case as this by

any fiction suggested by the counsel for plaintiff in error."

Foppino *v.* Speed, 199 U. S., 501, 520.

In *Armour Packing Company* v. *Lacy,* 200 U. S., 226, the argument was also made that the license tax was invalid as it in effect taxed the property which was protected from taxation under the commerce clause (p. 230). This contention, however, was overruled and the tax sustained.

This Court has frequently held that taxes on the transfer of property of decedents made under state laws and under the War Revenue Law of 1898 were not direct taxes, but license or transfer taxes. The taxes were held valid in each instance.

Magoun *v.* Ill. Trust & Savings Bank, 170 U. S., 283, 293.
Knowlton *v.* Moore, 178 U. S., 41.
Orr *v.* Gilman, 183 U. S., 329.
Billings *v.* Illinois, 188 U. S., 97.

So this Court has likewise sustained the franchise taxes on corporations imposed under state laws when the property of the corporation would have been wholly exempt from taxation. In *Home Life Insurance Company v. New York,* 134 U. S., 594, a large part of the corporation's property consisted of United States bonds. The Court while re-asserting the doctrine that United States bonds could not be directly taxed by a State, held that as this tax was on the franchise and indirect, it could not be affected by the nature of the property in which the capital stock was invested. The Court said:

"From the very nature of the tax being laid upon a franchise being given by the

> State, and revocable at pleasure, it can not be affected in any way by the character of the property in which its capital stock is invested."
>
> Home Life Ins. Co. *v.* New York, 134 U. S., 594, 601.

To the same effect is *New York v. Roberts*, 171 U. S., 658, 664, where the property consisted largely of goods in the original packages which the State was powerless to tax directly. The New York tax being one on the franchise and measured by all the corporation's property was sustained.

In the War Revenue Act of 1898 (Act of June 13, 1898), section 25, schedule A provided:

> "On all sales, or agreements to sell, or memoranda of sales or deliveries or transfers of shares or certificates of stock in any association, company or corporation, whether made upon or shown by the books of the association, company or corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other conveyance of transfer or sale, whether entitling the holder in any manner to the benefit of such stock or to secure the future payment of money or for the future transfer of any stock on each hundred dollars of face value or fraction thereof, two cents: * * *"

Change the words "association, company or corporation" to read "any foreign or domestic association or corporation" and the War Revenue Act is exactly the same, word for word, with the New York statute.

In *Treat* v. *White*, the statute came before this Court, where it was held that a "call" was an agreement to sell and therefore within the words of the statute. The Court said:

> "It is not to be assumed that Congress legislated with sole reference to transactions on stock exchanges, but its action is to be taken as having been exerted over the whole nation, and if it should so happen that dealings on any stock exchange come within the purview thereof, the parties so dealing are bound by it, and cannot claim an immunity from its burden. An isolated agreement to sell stock, made by an individual in Austin, Texas, is an agreement to sell, subject to the stamp duty imposed. It is none the less an agreement to sell when made in the Stock Exchange of New York, as one of a multitude of similar transactions * * * The power of Congress in this direction is unlimited. It does not come within the province of this Court to consider why agreements to sell shall be subject to stamp duty and agreements to buy not. It is enough that Congress in this legislation has imposed a stamp duty upon the one and not upon the other."
>
> Treat *v.* White, 181 U. S., 264, 268, 269.

In *United States v. Thomas,* an attack was again made on this statute and the counsel for the plaintiff in error argued that the tax was a direct tax and that the tax upon the sale of certificates of stock was in substance a tax upon the stock itself and was invalid because not apportioned according to enumeration as required by Clause 3 of Section 2 and Clause 4 of Section 9 of the Constitution. The brief for the Appellant (p. 364), cited *Brown v. Maryland; Welton v. Missouri; Cook v. Pennsylvania; Almy v. California; Nicol v. Ames* and *Fairbanks v. U. S.* The Court refused to adopt this argument, holding it was not a direct tax, and said:

> "There is no occasion to attempt to confine the words, duties, imposts and excises to the limits of precise definition. We think that they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like."
>
> Thomas *v.* U. S., 192 U. S., 363, 370.

After calling attention to decisions sustaining a number of excise taxes and distinguishing *Brown v. Maryland* and *Fairbanks v. United States*, the Court said:

> "The sale of stocks is a particular business transaction in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property in the form of certificates. The stamp duty is contingent on the happening of the event of sale, and the element of absolute and unavoidable demand is lacking. As such it falls, as stamp taxes ordinarily do, within the second class of the forms of taxation."
>
> Thomas *v.* U. S., 192 U. S., 363, 371.

It is difficult to see how this case can be distinguished from the case at bar for the **state statute,** as has already been stated, **is identical with the Act of Congress** there construed, and the State, through its legislature, has like power in matters of taxation which is afforded to the Congress of the United States. This rule is particularly applicable in matters of taxation and has been illustrated in a number of decisions of this court.

In *French v. Barber Asphalt Company* this court said:

> "Certainly it cannot be supposed that by the Fourteenth Amendment it was intended to impose on States in exercising their powers of taxation any more rigid or stricter curb than that imposed on the Federal government in a similar exercise of power by the Fifth Amendment."
>
> French *v.* Barber Asphalt Paving Co., 181 U. S., 324, 329.

In *Cook* v. *Marshall County* the statute in dispute was Section 5007 of the Iowa Code, which imposed a tax of three hundred dollars a year upon every person and also upon real property and the owner thereof whereon cigarettes were sold or kept for sale. The Act excluded from its provisions jobbers and wholesalers. It was argued that it denied the equal protection of the laws under the Fourteenth Amendment. After referring to the cases relative to the State power of classification of the subjects of taxation the Court said:

> "There is a clear distinction in principle between persons engaged in selling cigarettes generally or at retail, and those engaged in selling by wholesale to customers without the State. They are two entirely different occupations. One sells at retail and the other at wholesale, one to the public generally and the other to a particular class; one within the State, the other without. From time out of mind it has been the custom of Congress to impose a *special license* tax upon the wholesale dealers different from that imposed upon retail dealers. The like distinction is observed between brewers and rectifiers, wholesale and retail dealers of leaf tobacco and liquors, manufacturers of cigars, as well as peddlers of tobacco. It may be difficult to distinguish these several classes in principle, but the power of Congress to make this discrimination

has not, we believe, been questioned. * * * We are satisfied the section is not open to the objection of denying to the dealers in sigarettes the equal protection of the laws."

Cook *v.* Marshall County, 196 U. S., 261, 274.

In *Kehrer v. Stewart,* 197 U. S., 60, 69, the statute was one imposing a license tax upon meat packing houses within the State. The Court upheld the validity of the law and said:

"[illegible] have frequently held, the state has the [illegible]o classify occupations and to impo[illegible]rent taxes upon different occupations. Such has been constantly the practice of Congress under the Internal Revenue Laws, *Cook v. Marshall Co.,* 196 U. S., 261, 275, but the necessity for such tax and upon what occupations it shall be imposed, as well as the amount of the imposition, is exclusively within the control of the State Legislature."

Kehrer *v.* Stewart, 197 U. S., 60, 69.

POINT IV.

The act did not deny the relator due process of law.

If the tax imposed by Chapter 241 of the Laws of 1905 had been a direct tax the Act might be considered void for not affording to the seller of shares of stock a grievance day and opportunity to be heard. Such hearing, however, has never been required where indirect taxes have been imposed by legislative act which fixed a definite rate of license or excise. In the latter cases the statute

itself gives ample notice of the amount of tax and no hearing whatever is required. To calculate the tax in any particular case is a mere matter of mathematics.

Due process of law as applied to taxation means only taxation according to accepted usage. Granting that this tax is an indirect one and usage having settled that no hearing or grievance day is required it necessarily follows that the imposition of tax is not without due process of law. These elementary principles are illustrated by

Hagar *v.* Reclamation District, 111 U. S., 701, 711;
Bells Gap Railroad *v.* Pennsylvania, 134 U. S., 232, 239.

The subject is fully treated by Judge Vann in his opinion in the Court of Appeals (Rec., p. 51; 184 N. Y., 431, 446, 447), citing besides the cases just quoted *Hilton v. U. S.*, 3 Dallas, 171; *Knowlton v. Moore*, 178 U. S., 41, 60.

POINT V.

L. 1905, Chap. 241, does not deny the equal protection of the laws.

The main argument of the plaintiff in error is directed toward the contention that the Stock Transfer Tax Act violates the Fourteenth Amendment in that it denies the equal protection of the laws. The subject is an extensive one. The District Attorney considers it under the following general heads:

I.—The State may classify its subjects of taxation in any reasonable way.

The leading case upon this subject is *Bell's Gap R. R. Co. v. Pennsylvania,* 134 U. S., 232, which has been cited with approval in many of the subsequent cases in the Supreme Court of the United States which have treated the subject, holds substantially that the State's power to classify the subjects of taxation is unlimited, provided that injustice or oppression is not accomplished.

The Court said:

> "The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose *different specific* taxes upon *different trades* and professions, and may vary the *rates of excise upon different products;* it may tax real estate and personal property in a different manner; it may tax *visible* property only, and not tax securities; it may allow deductions for indebtedness or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State legislature or the people of the State in framing their constitution."
>
> Bell's Gap. R. R. *v.* Penn., 134 U. S., 232, 237.

The cases stating and reaffirming the general principle of the Bell's Gap case are:

Kentucky R. R. Tax Case, 115 U. S., 321;
Pac. Exp. Co. *v.* Siebert, 142 U. S., 339, 351;
Giozza *v.* Tiernan, 148 U. S., 657, 662;
Winona & St. P. Co. *v.* Minn., 159 U. S., 526, 539;
Adams Exp. Co. *v.* Ohio, 165 U. S., 195;
Magoun *v.* Ill. Tr. & Sav. Bk., 170 U. S., 283, 360;
Nicol *v.* Ames, 173 U. S., 509, 521;
Amer. Sugar Ref. Co. *v.* La., 179 U. S., 89, 94;
Connolly *v.* Union S. Pipe Co., 184 U. S., 562;
Trav. Ins. Co. *v.* Conn., 185 U. S., 365;
Billings *v.* Ill., 188 U. S., 97;
Kidd *v.* Alabama, 188 U. S., 730;
Cook *v.* Marshall Co., 196 U. S., 261;
Coulter *v.* L. & N. R. R., 196 U. S., 599;
Armour Packing Co. *v.* Lacy, 200 U. S., 226;
Michigan Central R. R. *v.* Powers, 201 U. S., 245.

Of these cases, one of the latest is Cook *v. Marshall County*, where the tax was a license tax upon cigarette dealers. The Court after referring to various authorities apparently adverse, said:

> "These cases however have but limited application to *laws imposing taxes* where the right of classification is held to permit of discrimination between different trades and callings when not obviously exercised in the

spirit of prejudice or favortism. *Kentucky Railroad Tax Case*, 115 U. S., 321; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S., 283; *American Sugar Refining Co.* v. *Louisiana*, 179 U. S., 89; *Bell's Gap Railroad Company* v. *Pennsylvania*, 134 U. S., 232. This distinction was recognized by Mr. Justice Harlan in *Connolly* v. *Union Sewer Pipe Co.* (184 U. S.) on page 562, wherein it is said 'A State may in its wisdom classify property for purposes of taxation and the exercise of its discretion is not to be questioned in a Court of the United States so long as the classification does not invade rights secured by the Constitution of the United States.' It can scarcely be doubted that if the *Connolly* case had dealt with the subject of *taxation* a discriminative tax upon producers of agricultural products, either greater or less than that imposed upon other manufacturers or producers, might have been held valid without denying to either party the protection of the laws."

Cook *v.* Marshall County, 196 U. S., 261, 274.

In *Coulter* v. *L. & N. R. Co.*, the railroad company in its bill alleged that the State taxing Board of Kentucky had assessed it at full value while other property had only been assessed at eighty per cent. of its value; and that, therefore, it was denied the equal protection of the laws under the fourteenth amendment. Holmes, J., said:

"If it be a fact that a franchise of a Kentucky corporation is taxed at a different rate from tangible property of the State, there can be no question that the State had power to tax it at a different rate so far as the Constitution of the United States is concerned."

Coulter *v.* L. & N. R. Co., 196 U. S., 599, 608.

In *Michigan Central R. R.* v. *Powers* (201 U. S., 245), the question of powers of this Court over state taxation was considered. Mr. Justice Brewer said:

> "We have had frequent occasion to consider questions of state taxation in the light of the Federal Constitution, and the scope and limits of National interference are well settled. There is no general supervision on the part of the Nation over state taxation, and in respect to the latter the State has, speaking generally, the freedom of a sovereign both as to objects and methods. It was well said by Judge Wanty, delivering the opinion of the Circuit Court in this case (p. 232):
>
> 'There can at this time be no question, after the frequent and uniform expressions of the Federal Supreme Court, that it was not designed by the Fourteenth Amendment to the Constitution to prevent a State from changing its system of taxation in all proper and reasonable ways, nor to compel the States to adopt an ironclad rule of equality, to prevent the classification of property for purposes of taxation, or the imposition of different rates upon different classes. It is enough that there is no discrimination in favor of one as against another of the same class, and the method for the assessment and collection of the tax is not inconsistent with natural justice. *Bell's Gap Railroad Company v. Pennsylvania*, 134 U. S., 232; *Giozza v. Tiernan*, 148 U. S., 657, 662; *Adams Express Company v. Ohio*, 165 U. S., 194, 228; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S., 283; *Billings v. Illinois*, 188 U. S., 97; *Merchants' Bank v. Pennsylvania*, 167 U. S., 461; *Kentucky Railroad Tax Cases*, 115 U. S., 321; *Home Insurance Company v. New York State*, 134 U. S., 594; *Gulf, Colorado & Santa Fe Railroad Company v. Ellis*, 165 U. S., 150; *Clark v. Titusville*, 184 U. S., 329; *American Sugar Refining Company v. Louisiana*, 179

U. S., 89; *New York State v. Barker*, 179 U. S., 279; *Charlotte, &c., Railway Company v. Gibbes*, 142 U. S., 386; *Travelers' Insurance Company v. Connecticut*, 185 U. S., 364; *Kidd v. Alabama*, 188 U. S., 730; *Turpin v. Lemon*, 187 U. S., 51; *Florida, &c., Railroad Company v. Reynolds*, 183 U. S., 471.' "

Michigan Central Railroad *v.* Powers, 201 U. S., 245, pp. 292-293.

Answering the objection that the real property in question was taxed at a higher rate than other property generally and therefore it was denied equal protection of the law, he said:

"It may also be said that a legislature is not bound to impose the same rate of tax upon one class of property than it does upon another. As it may exempt all of one class, so it may impose a different rate of taxation. It is sufficient if all of the same class are subjected to the same rate and the tax is administered impartially upon them."

Michigan Central Railroad *v.* Powers, 201 U. S., 245, 302.

In *Billings* v. *Illinois*, an inheritance law taxed life estates when the remainder went to lineals and exempted them when the remainders went to collaterals or strangers. It was held that the act was proper within the classifying power of the State.

Billings *v.* Ill., 188 U. S., 97.

In *Orr* v. *Gilman*, the transfer tax law of New York was held a proper exercise of the State's right of classification.

Orr *v.* Gilman, 183 U. S., 278.

In *Adams Exp. Co.* v. *Ohio,* the statute grouped express, telegraph and telephone companies and provided that such companies should be taxed on that portion of their entire property which was within the State. The statute likewise directed that the property of the corporations, wherever situated, should be included in the valuation so as to enable the valuation of the proportionate part within the State to be determined. It was held that the statute was a valid exercise of the State's power of classification.

Adams Exp. Co. *v.* Ohio, 165 U. S., 195.

In *Trav. Ins. Co.* v. *Conn.,* the statute of Connecticut taxed the shares of certain named classes of corporations owned by non-residents at one and one-half per cent. of their market value, while the taxation of shares owned by residents was at the market value of the shares less an amount representing the value of the corporation's real estate. It was averred in the company's answer that the non-residents paid much larger taxes than residents; and, therefore, the act violated the equal protection of the law's provision of the Fourteenth Amendment. This contention was overruled and the Act was sustained.

Trav. Ins. Co. *v.* Conn., 185 U. S., 365.

In *Amer. Sug. Ref. Co.,* v. *Louisiana,* Louisiana's tax on those carrying on the business of refining sugar and molasses was graded according to the amount of receipts, and, the Act, at the same time, exempted planters and farmers grinding and refining their own sugar and molasses. It was, however, held constitutional as a reasonable classification.

Amer. Sugar Ref. Co. *v.* La., 179 U. S., 89.

In *New York State v. Barker*, 179 U. S., 279, this Court held valid Section 12 of the New York Tax Law (Chapter 908, Laws of 1896) which provided that in assessing the capital stock of a corporation all of the corporation's property, both real and personal was to be included and only the *assessed* value of its real estate deducted. Under this Act it was possible in valueing the capital stock of a corporation to tax the *difference between the actual value of the corporation's real estate and its assessed value*, while no such taxation was permissible respecting the real estate of individuals. The Court however sustained the method of asessment, holding it a matter within the power of the State.

In *Winona & St. Peter Land Company* v. *Minnesota*, the statute provided that back taxes on real estate should be collected, but no provision was made for the collection of back taxes on personal property. It was held that the statute was valid within the meaning of the fourteenth amendment.

Winona & St. Pet. Land Co. *v.* Minn.,
159 U. S., 526.

The recent case of *Armour Packing Company v. Lacy*, 200 U. S., 226, disposes of many of the contentions advanced by the plaintiff in error in the state courts.

In that case the Revenue Act of North Carolina, passed March 9th, 1903, provided:

> "Schedule D.—Section 26. *Defining Taxes Under this Schedule.* Taxes in this schedule shall be imposed as license tax for the privilege of carrying on the business or doing the act named, and nothing in this act contained shall be construed to relieve any person or corporation from the payment of tax as required in the preceding schedule."

> "Section 56.—*Packing Houses.* Upon every meat packing house doing business in this State $100. for each County in which said business is carried on."

It appeared that the Armour Packing Company, a New Jersey corporation, carried on its business of meat packing in Kansas, where the animals were slaughtered and the by-products obtained. It maintained cold storage plants and warehouses at various places in North Carolina, where it sent goods in bulk and which were sold from those plants. It also appeared that others in the State who were not engaged in the meat packing business sold the same products as the Armour Packing Company, and that other packing houses packed other articles than meat, such as peas, beans, tomatoes, etc., and that no license tax was imposed upon them.

In this Court it was argued that the tax maintained an arbitrary discrimination among persons of the same class and was generally obnoxious to the Constitution in that it denied to the Armour Packing Company the equal protection of the laws.

The Court, after holding that the Act was not objectionable as being in interference with interstate commerce, said:

> "This practically disposes of the fourth and fifth contentions, since the classification of meat packing houses cannot be said to be an arbitrary selection or not to rest on reasonable grounds, and the Fourteenth amendment was not intended to prevent the State from adjusting its system of taxation in all proper and reasonable ways or through the undoubted right of classification to impose different taxes upon different trades and professions. 'A tax may be imposed only on certain callings and trades, for when the State exerts its

power of tax it is not bound to tax all pursuits or all property that may be legitimately taxed for Governmental purposes. It would be an intolerable burden if the State could not tax any property or calling unless at the same time it taxed all property or all callings.' *Connolly v. Union Sewer Pipe Co.*, 184 U. S., 540-562."

Armour Packing Co. *v.* Lacy, 200 U. S., 226, 235.

The *Bell's Gap* case, above referred to, was relied upon in almost all of the cases which we have just reviewed, especially in the cases of *Coulter v. L. & N. R. R.; Giozza v. Tiernan; Adams Exp Co. v. Ohio; Trav. Ins. Co. v. Conn.; Amer. Sug. Ref. Co. v. La.*, and *Michigan Central R. R. v. Powers.*

As far as can be ascertained, its doctrine has never been questioned; and, of itself, it would seem to be ample authority for sustaining the validity of the statute now under review.

2. *The Stock Transfer Act (L. 1905, Chap. 241) effects a reasonable classification.*

The Legislature of New York in fixing this license tax doubtless had in mind the peculiar immunities from taxation which had previously been enjoyed in New York by persons engaged in the business of buying and selling shares of corporate stock. Before the passage of L. 1905, Chap. 241, persons owning or dealing in stocks bore but little of the State's burden of taxation. Shares of corporate stock were not included in the personal assessments of individuals (Tax Law, § 7, Subd. 16) because taxes upon them were presumed to be paid by the corporations. Under this presumption this large mass of personal property in

many cases escaped taxation, because in many instances the large bond issues and other indebtedness of these large corporations were sufficient to wipe out their other assets taxable under Section 12 of the Tax Law and thus their capital was not taxed.

Moreover, corporations exercising franchises including banking corporations and trust companies paid a tax to the State for the privilege of exercising their franchises (Tax Law, Section 187 A, 187 B); individual bankers, residents of the State were taxed on their entire capital (Tax Law, Sec. 14) and non-resident bankers were required to pay a tax of five per cent. on the amount earned during the year (Tax Law, Sec. 188). The Court of Appeals of New York decided (People *ex rel.* Lemon *v.* Feitner, 167 N. Y., 1), that although a seat on the Stock Exchange was property and subject to the State's power of taxation, yet the Legislature had never included it in its definition of personal property contained in the Tax Law (Sec. 2) and that therefore the value of a seat on the Stock Exchange of a resident or non-resident of the State of New York could not be assessed for the purpose of taxation. In this way seats on the New York Stock Exchange, which are now worth over ninety thousand dollars, entirely escaped their share of the burdens of government and the same was true of the value of seats in the other minor exchanges. Other citizens not owning stocks in corporations were assessed for taxation upon all their personal property so that the community in and about Wall Street and those whose property consisted largely of corporate stocks had freedom from taxation not perhaps enjoyed in any other portion of the State of New York or in any other community of the United States.

Chapter 241 of the Laws of 1905 was passed to remedy this inequality and it is urged that it was a reasonable exercise of the State's power of classification in matters of taxation.

This Court has already sustained the right of the State to treat stocks of corporations differently from other property. In *Otis* v. *Parker*, the State of California prohibited the sale of stock of corporations or associations when such sales were made upon margin, and authorized the recovery of any money paid in such transactions. It was objected that the constitution of California deprived persons of their property without due process of law and that unjust discrimination was made in that stocks of corporations alone were selected. The Court overruled both of these contentions, and upon the second one Justice Holmes said:

> "The circumstances disclosed a reasonable ground for classification, and thus distinguished the case from Connelly *v.* Union Sewer Pipe Co., 184 U. S., 540. We cannot say that treating **stocks of corporations as a class subject to special restrictions** was unjust discrimination or the denial of the equal protection of the laws."
>
> Otis *v.* Parker, 187 U. S., 606, 610.

Shares of stock of foreign corporations have, in some States, been taxed directly to their resident owner. In *Kidd v. Alabama* such a tax was imposed, and Justice Holmes said:

> "We need not repeat the commonplaces as to the large latitude allowed to the States for classification, upon any reasonable basis (cases cited). What is reasonable, is a question of practical details, into which fiction cannot enter. Practically, the law before us, in the broad aspect in which, alone, we are

> asked to consider it, seems to us to work out substantial justice and equality, if we leave on one side probable taxation by other States, which does not affect the State of Alabama's rights."
>
> Kidd *v.* Alabama, 188 U. S., 730, 734.

Stock of corporations is an intangible species of property which has a number of advantages which tangible personal property does not possess. It protects the owner, in being registered on the books of the corporations, and yet, by assignment in blank, may be transferred from hand to hand like negotiable paper. Practically, shares of stock can be more rapidly and readily realized upon than ordinary commercial paper, for anyone would make a loan upon good stock when he might hesitate to accept the commercial paper of a person who was not fully known to him. Then too, a person who has his property invested in stocks has a great advantage over the man having assets in a partnership, for he does not run the risk of the unlimited liability for his partners' debts.

For these reasons, there is a great difference between sales of intangible property of this character and sales of such tangible property as wheat, iron, lumber, coal or corporate bonds, which are referred to in the brief of the plaintiff in error. The present act does not differentiate sales of one species of tangible personal property, but picks out this intangible property, which had previously borne so little of the burdens of taxation, and by imposing a duty or excise upon its transfer, has attempted to equalize the burdens of taxation.

In the present case, the petition for the writ of *habeas corpus* avers that the total purchase price of the two hundred shares of stock involved in this

proceeding was $20,275 (Rec., p. 2), and the tax on these two hundred shares, at the rate of two cents for each $100., would only be $4.00, which cannot be said to be anything but a small and almost infinitesimal burden.

All persons who sell stocks are similarly treated. It is well settled that no law is unconstitutional which treats alike all persons who are similarly situated.

With respect to the subject of taxation, the Supreme Court has said:

> "* * * if the constituents of each class are affected alike, the rule of equality prescribed by the cases is satisfied. In other words the law operates equally and uniformly upon all persons in similar circumstances."
>
> Billings *v.* Ill., 188 U. S., 97, 103.

To the same effect is

> Kentucky Railroad Tax Cases, 115 U. S., 321, 327.

Plaintiff in error concedes that the State would have the right to tax the sales of *all* personal property, yet urges that the tax is invalid because the Legislature has failed to tax the sales of *other* properties.

A similar contention was made in

> Cargill Co. *v.* Minnesota, 180 U. S., 452,
>
> Savannah, Thunderbolt, etc., Railroad Co. *v.* Savannah, 198 U. S., 392,
>
> Armour Packing Co. *v.* Lacy, 200 U. S., 226,

and in other cases already cited, but in all cases the contention was overruled.

In *Cargill Co.* v. *Minnesota*, the statute of Minnesota required a license from the owners of elevators and warehouses situated on the right of way of any railroad at one of its stations or sidings, other than at terminal points, without requiring a license in respect to elevators and warehouses differently situated. It was held that this discrimination did not make the law obnoxious to the provisions of the 14th amendment.

> Cargill Co. *v.* Minnesota, 180 U. S., 452, 469.

In *Savannah Thunderbolt, etc., Railroad* vs. *Savannah* there was under consideration an ordinance of the City of Savannah imposing upon street railroad companies for the privilege of doing business a tax at the rate of $100 per mile of its track used in the City of Savannah. It was urged that the ordinance was invalid under the provisions of the 14th amendment, because a steam railroad, which also did a local business in the streets of the city, was not subject to the tax. The Court, however, held that the Act was a proper exercise of the right of classification, Mr. Justice Holmes saying:

> "The difference between the two railroads is obvious and warrants that diversity in the mode of taxation."
>
> Savannah Thunderbolt, etc., Railroad *v.* Savannah, 198 U. S., 392, 397.

In *Armour Packing Co.* v. *Lacy*, the Court said:

> "But we cannot accept the suggestion that the statute is void as denying the equal pro-

tection of the laws to meat packing houses because houses packing vegetables and the like are not included in the same classification and subject to the same tax."

Armour Packing Co. *v.* Lacy, 200 U. S., 226, 236.

In *Magoun v. Illinois Trust & Savings Bank*, the Court said:

"All license taxes and all specific taxes have in them an element of inequality; nevertheless, they are universally imposed and their legality has never been questioned."

Magoun *v.* Illinois Trust & Savings Bank, 170 U. S., 283, 300.

The State of New York requires a fee to be paid upon the recording of conveyances and mortgages of real estate and personal property. These statutes which thus tax transfers of property have always been upheld as constitutional. There is no difference in principle between such taxes and the tax imposed by L. 1905, Chap. 241.

III. The fact that the tax is measured by the par value of the shares does not invalidate the act.

The Plaintiff in error claims that the tax is necessarily unequal because some shares of stock are worth less than par, while others are worth more than par.

The immediate answer to this proposition is that the tax is **not on the stock itself, but is on the mere privilege** of selling it. This proposition has been already discussed.

The District Attorney believes that at least

three cases which have been decided by the Court determine that the act of the Legislature in measuring this tax by the par value of the stock involves no violation of the Fourteenth Amendment.

The first of these cases is the *Bell's Gap Railroad* case, which we have already discussed at length.

In the *Bell's Gap Railroad* case, an act of Pennsylvania imposed a tax on the **par value** of bonds of a corporation, while other moneyed securities were taxed upon their actual value. The company urged that the actual value was *less* than the face value, and, therefore, the tax was invalid under the Fourteenth Amendment. The Court overruled this contention, at pages 236, 237 and 238 of the opinion.

Bell's Gap R. R. Co. *v.* Penn., 134 U. S., 232.

In *Jennings v. The Coal Ridge Improvement Co.*, the same law of Pennsylvania was again in question, and it was argued that the *market value* of the bonds in question was twenty-five per cent less than their face value. It was held, however, that the law was *constitutional* and that the tax was properly imposed upon the face value of the bonds. The Bell's Gap Railroad case was followed.

Jennings *v.* Coal Ridge Impr. Co., 147 U. S., 147.

In *Merchants & Mfrs. Bank v. Pennsylvania*, the law imposed a tax on shares of banks and savings banks of eight mills on the dollar on **par value** of all shares, which tax might be paid in lieu of a four mills tax on the actual value. It was held that the fact that the eight mills tax was based on **face value** instead of actual value did not make it obnoxious to the Federal Consti-

tution, and *Bell's Gap R. R. case* and *Jennings v. Coal Ridge Improvement Co.* were followed.

Merch. & Mfrs. Bank *v.* Penn., 167 U. S., 461.

It is obvious that the practical working of the New York act in question will not prove a hardship, as it is a matter of common knowledge that the list of stocks usually sold on the New York Stock Exchange shows that more stocks sell for *more than par than sell for less;* so that the provisions of this act will in the long run work no hardship upon sellers of stock certificates. It would be highly impracticable to base the tax on the actual value of shares, which fluctuate so largely; and a large force of collectors would have to be employed to see that the exact amount of stamps was imposed according to the *value at the moment as well as of the day of sale.* If the stock were sold in small lots, it would be impossible even to approximate the proper tax. Another practical suggestion is that on all sales of stock on the New York Exchange the brokers' commissions are adjusted on the basis of the *par value* of the shares and not on the actual market value.

Other taxing acts of New York, moreover, have a similar basis for measuring the tax. The tax on trust companies (under § 187 A of the Tax Law), is upon the capital stock, surplus and undivided profits, which means the capital stock at par; and the value of the company's property thus ascertained is often far less than the *market value* of its shares.

The tax on savings banks (§ 187 B of the Tax Law) is expressly imposed on the **par value** of its surplus and undivided earnings.

Section 24 of the Tax Law provides that the

shares of banks shall be taxed upon the amount of their capital stock, surplus and undivided profits, divided by the number of shares, and that no *deduction for debts shall be made.* This statute also imposes a different standard than the actual or market value of the shares.

A corporation under Section 12 pays a tax not on the actual value of its property, but is permitted a *deduction* for surplus up to ten per cent., of the assessed value of its real estate and of the value of stocks of other corporations, and the market value of the shares is not considered.

People ex rel. Manhattan Railway Company v. *Barker*, 165 N. Y., 304.
New York *v.* Barker, 179 U. S., 279.

Railroads, express companies, elevated railroads and surface roads pay a franchise tax on gross earnings (Sections 184, 185), and not upon the *actual value* of their property. As stated by Justice Holmes in *Kidd* v. *Alabama* (*supra*), the question of classification in taxation is a "question of practical details," and it is submitted that the methods of taxation already adopted in this State form a precedent for the taxation now proposed, and that as a practical matter it is necessary that the tax be imposed upon the par value of the shares.

POINT VI.

The act does not violate the commerce clause of the Federal Constitution.

It appears from the record in the case at bar that the sales of the shares of stock of the Southern Railway Company and of the Chicago, Milwaukee & St. Paul Railway Company were made within the County of New York; that they were delivered within the County of New York. There is nothing whatever to show that they had not remained in the County of New York for months, or even years, prior to the time of their sale. The District Attorney submits that, under these circumstances, the relation of the sale to interstate commerce is so remote as to wholly exclude that objection to the constitutionality of this act. As has been well said by this court:

> "In this day of multiplied means of intercourse between the States, there is scarcely any contract which cannot, in a limited or remote degree, be said to affect interstate commerce, but it is only direct interferences with the freedom of such commerce that brings the case within the exclusive domain of Federal legislation."
>
> Field *v.* Barber Asphalt Paving Co., 194 U. S., 618, 623.

In *Pennsylvania Railroad Company v. Knight*, this Court considered the franchise tax imposed by the State of New York on the Pennsylvania Railroad Company for the business of running cabs between its ferry at the foot of West 23rd Street, New York City, and various places within the City of New York. This Court, after quoting from *Coe v. Errol*, 116 U. S., 517, said:

"As shown in the opinion from which we have just quoted, many things have more or less close relation to Interstate commerce, which are not properly to be regarded as a part of it. If the cab which carries the passengers from the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler's trunk from his room to his carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply the hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed?

"We are of the opinion that the cab service is an independent local service, preliminary and subsequent to any interstate transportation, and therefore the judgment of the Supreme Court of the State of New York is correct and it is affirmed."

Pennsylvania Railroad Co. *v.* Knight, 192 U. S., 21, 28.

See also

Diamond Glue Co. *v.* U. S. Glue Co., 187 U. S., 611, 616.

This court has frequently held that, although a State may not tax interstate commerce, yet it may impose a tax on property used to facilitate interstate commerce, such as the rolling stock or vessels of a foreign corporation.

Pullman Palace Car Co. *v.* Pennsylvania, 141 U. S., 18, 23.

Old Dominion Steamship Co. *v.* Virginia, 198 U. S., 299, 305.

If Chapter 241 of the laws of 1905 had attempted **merely to tax** the sales or transfers of the shares of **foreign** corporations, it might

be argued with more force that this was a restraint on interstate commerce, but the law specifically taxes **the sales of all stocks, both domestic and foreign,** and its jurisdiction to do so depends on the sales taking place within its borders; and no movement or transportation of goods is contemplated. Under these circumstances it is always held that the State may tax goods or the sale of such goods without violating the commerce clause of the constitution.

Woodruff *v.* Parham, 8 Wallace, 123;
Emert *v.* Missouri, 156 U. S., 296, 311;
American Steel & Wire Co. *v.* Speed, 192 U. S., 500, 520;
Kehrer *v.* Stewart, 197 U. S., 60, 69;
Armour Packing Co. *v.* Lacy, 200 U. S., 226, 234, 235.

In *Hopkins v. U. S.*, the Court had before it the regulations of the Kansas City Live Stock Exchange, which bore upon the conduct of its members in the business of receiving consignments of cattle, feeding them and preparing them for the market, and distributing the proceeds to the shippers. Various restrictions were placed on the conduct of the business by the members of the exchange. It was argued that these restrictions and agreements interfered with Interstate commerce. The Court said:

> "Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation,

purchase, sale and exchange of commodities between the citizens of different States, and the power to regulate it embraces all the instruments by which such commerce may be conducted. *Welton v. Missouri,* 91 U. S., 275; *Mobile County v. Kimball,* 102 U. S., 691; *Goucester Ferry Company v. Pennsylvania,* 114 U. S., 196; *Hooper v. California,* 155 U. S., 648, 653; *United States v. E. C. Knight Company,* 156 U. S., 1.

"But in all the cases which have come to this court there is not one which has denied the distinction between a regulation which directly affects and embarrasses interstate trade or commerce, and one which is nothing more than a charge for a *local facility* provided for the transaction of such commerce. On the contrary, the cases already cited show the existence of the distinction and the validity of a charge for the use of the facility."

The opinion then proceeded to consider almost the exact situation presented in this case, saying:

"The services of members of the different stock and produce exchanges throughout the country in effecting sales of the articles they deal in are of a similar nature. Members of the New York Stock Exchange buy and sell shares of stock of railroads and other corporations, and the property represented by such shares of stock is situated all over the country. Is a **broker** whose principal lives outside of New York State, and who sends him the shares of stock or the bonds of a corporation created and doing business in another State, for sale, **engaged in interstate commerce?** If he is employed to purchase stock or bonds in a like corporation under the same circumstances, is he then engaged in the business of interstate commerce? It may, perhaps, be answered that **stocks** or bonds are not commodities, and that **dealers therein are not engaged in commerce.** Whether it is an answer to

the question need not be considered, for we will take the case of the New York Produce Exchange. Is a member of that body to whom a cargo of grain is consigned from a western State to be sold engaged in interstate commerce when he performs the service of selling the article upon its arrival in New York and transmitting the proceeds of the sale less his commissions? Is a New Orleans Cotton broker who is a member of the Cotton Exchange of that city, and who receives consignments of cotton from different States and sells them on 'Change in New Orleans and accounts to his consignors for the proceeds of such sales less his commission, engaged in interstate commerce? Is the character of the business altered in either case by the fact that the broker has advanced moneys to the owner of the article and taken a mortgage thereon as his security? We understand we are in these queries assuming substantially the same facts as those which are contained in the case before us, and if these defendants are engaged in interstate commerce because of their services in the sale of cattle which may come from other States, then the same must be said in regard to the members of the other exchanges above referred to. We think it would be an **entirely novel** view of the situation if all the **members of these different exchanges** throughout the country were to be regarded as engaged in **interstate commerce,** because they sell things for their principals which come from States different from the one in which the exchange is situated and the sale made."

Hopkins *v.* U. S., 171 U. S., 578, 597-598.

The District Attorney submits that, under the doctrine which permits the taxation of imported goods by the State as soon as they have come out of the original packages, it may well be argued

that Chapter 241 of the Laws of 1905 is in no way in interference with interstate commerce. So far as appears, the stocks may have been in New York for years, and the relator, Hatch, although a resident of Connecticut, may have come to New York to his office daily for the purpose of doing business in the city. There is nothing in the record to indicate that **transportation** of the certificates preceded the sale, and in the absence of discrimination against the shares of foreign corporations, must not transportation in some way enter into the transaction to bring it within interstate commerce? In this respect, the case at bar differs so materially from the **"drummer"** cases where the goods are shipped from one State to the other.

In the Court of Appeals in the present case Vann, J., said:

> "What is commerce? According to the derivation, history and use of the word it is the exchange of property and includes the usual agencies of communication and transportation employed to effect the exchange. Thus it extends to whatever is used to move the property involved and the persons engaged in making the contract. Interstate commerce, or commerce among the states, means the exchange of property in one state for property in another state. Its essential characteristic is that the property affected must be transported to some point without the state. There must be interstate movement of property. The telegraph cases do not conflict with this view, for the telegraph practically transports either news or money. The interchange may be between residents of different states or residents of the same state, but the property exchanged must move from one state to another. There can be no interstate commerce without interstate transportation of property, which includes money as well as merchandise and whatever can become the subject of exchange.

> "Even upon the assumption that certificates of stock are property, the transaction in question involved no movement of property from one state to another, for so far as appears neither money nor property was brought into the state or taken out of it."
>
> (Record, p. 55; 184 N. Y., 431, 452.)

Moreover, it must not be overlooked that the tax is not a direct one, but an excise duty on the exercise of a privilege within the State.

Then, too, even if the shares had been recently brought to the city for sale they could be taxed, because of their physical presence within the State.

The modern rule is that shares of stock have a taxable situs within the State where the certificates are physically present, even though in one sense, they confer but a right to a share of property situated in the State where the corporation exists.

> People *v.* The Commissioners, 4 Wall., 258.
> Simpson *v.* Jersey City Contracting Co., 165 N. Y., 193.
> Kidd *v.* Alabama, 188 U. S., 730.
> Union Transit Co. *v.* Kentucky, 199 U. S., 194, 205.

In *Union Transit Co.* v. *Kentucky,* the Court, in speaking of the taxation of intangible property, such as mortgages or shares of stock and the right of the State to tax it, either at the place of the domicile of the owner or at the place where the shares are situated, said:

> "If this occasionally results in double taxation it much oftener happens that this class of property escapes altogether. In the case

> of intangible property the law does not look for absolute equality, but to the much more practicable consideration of collecting the tax upon such property, *either in the state of the domicil or the situs.*"
>
> Union Transit Co. *v.* Kentucky, 199 U. S., 194, 205.

In *Kidd* v. *Alabama* this Court sustained an Alabama act which imposed a personal tax upon its citizens who held stock in foreign corporations, but exempted the shares of domestic corporations. Holmes, J., in discussing the statute said:

> "It adheres throughout to the fiction, if it be one, that the stock and property of the plaintiff in error is within the jurisdiction. There is no inconsistency in the State recognizing at the same time that the property of the corporation, that which gives the appellant's stock its value, is taxed or untaxed, as the case may be. There is no inconsistency in recognizing that it is untaxed because it cannot be reached. *Shares of stock may be within a state and the property of the corporation outside of it.*"
>
> Kidd *v.* Alabama, 188 U. S., 730, 733.

POINT VII.

The novelty of the tax does not condemn it.

Much of the brief of the plaintiff in error in the state courts was given to arguments about the unheard-of character of this tax. Such arguments

are always advanced when a State has attempted a somewhat new method of taxation.

The earlier cases upon the collateral inheritance tax law indicate this, as do the recent cases under the special franchise tax law of New York. With respect to the latter law, this Court in affirming the decision of the Court of Appeals declared that the newness of the property selected for taxation, and the fact that it had never been taxed before, was no objection; and that the Legislature had the right to grant or withhold deductions or exemptions in its discretion.

> Met. St. Ry. Co. *v.* N. Y., 199 U. S., 1; at pp. 44, 45, 47.

Conclusion.

In the state courts the plaintiff in error strenuously urged that L. 1905, chap. 241, was unjust as well as illegal Such arguments relating to the policy of the law and not strictly to its constitutionality, should be addressed to the New York Legislature and not to this Court, for this Court is not concerned with the policy or wisdom of a taxation statute of a State but merely whether or not it offends the Constitution of the United States. The attitude of this Court has recently been restated.

In the *Michigan Central Railroad* case, the Court in considering the remedies which a taxpayer had against unwise taxation by a State, said:

> "As said by Mr. Chief Justice Marshall, in *McCulloch v. Maryland*, 4 Wheat., 316, 428: 'The only security against the abuse of this power, is found in the structure of the Government itself. In imposing a tax the legislature acts upon its constituents. This is in

general a sufficient security against erroneous and oppressive taxation.' And again, in *Providence Bank* v. *Billings*, 4 Pet., 514, 563: 'This vital power may be abused; but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the state governments. The interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security where there is no express contract, against unjust and excessive taxation, as well as against unwise legislation generally.' ''

Michigan Central Railroad *v.* Powers, 201 U. S., 245, 295, 296.

The District Attorney submits that this Stock Transfer Tax Act is fair, reasonable, and was passed to equalize the burden of taxation in the State of New York, and to raise revenue in the manner least felt throughout the community. Whatever may be its merits or demerits from the standpoint of political economy, however, it is urged that there can be no doubt of its constitutionality.

The order of the Supreme Court of the State of New York dismissing the writ of habeas corpus should be affirmed with costs.

December 10, 1906.

Respectfully submitted,
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